United States Court of Appeals
for the Second Circuit

APPENDIX

77-1342

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1342

B

P/S

UNITED STATES OF AMERICA,
Appellant,

—v.—

DOUGLAS P. FIELDS, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FILED
SEP 21 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

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Attorneys for Defendants
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New York, N. Y. 10007

ORANS, ELSEN & POLSTEIN
Attorneys for Defendant
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One Rockefeller Plaza
New York, N. Y. 10020

GRAND & OSTROW
Attorneys for Alan E. Sandberg
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New York, N. Y. 10020

KOSTELANEZ & RITHOLZ
Attorneys for Defendant
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New York, N. Y. 10005

PAGINATION AS IN ORIGINAL COPY

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CRIMINAL DOCKET - U.S. District Court

JUDGE/MAGISTRATE Assigned		Disp./Sentence	U.S. vs	(LAST, FIRST, MIDDLE)			Case Filed Mo / Day	Yr.	Docket No.	Def.
6208	1	0865		FIELDS, DOUGLAS P.	A	1	11 / 08	76	1022	01
District	Office					☐ JUVENILE	No. of Defts * 05			

X

U.S. MAG. CASE NO. ▶

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Consp. to viol. Federal Securities Laws	1
15:77q(a) & 77x	Fraud in the offer & sale of securities	2
18:1001	Making false statements to the S.E.C.	3
15:78n(a)&78ff	Distributing false proxy statements	4-5

SUPERSEDING COUNTS

BAIL • RELEASE

☐ Denied AMT Set $ 000

☐ Fugitive ☐ Pers. Recog ☐ PSA

Date

conditions: ☐ 10% Deposit ☐ Surety Bond ☐ Collateral ☐ 3rd Prty Cust ☐ Other

☐ Bail Not Made

☐ Status Changed (See Docket)

II. KEY DATES & INTERVALS

ARREST or: U.S. Custody Began / Summons Served / First Appearance

High Risk Date

In Charging District

INDICTMENT ☒ Information ☐

11-8-76

Indict. Waived ☐

Superseding ☐ Indict/Info ☐

ARRAIGNMENT 11-18-76

1st Plea ☒ NG ☐ G ☐ NOL

11-18-76

G. Plea W/Drawn

Final Plea ☐ NG ☐ G ☐ NOL CO

TRIAL

Trial Set For 4-18-76

Voir Dire ☐

Trial Began ☐ J ☐ N J

Trial Ended

SENTENCE

Disposition of Charges

☐ Convicted ☐ Acquitted ☐ Dismissed.

☐ On All Charges ☐ On Lesser Offense(s)

☐ WOP. ☐ WP

☐ On Governm'ts Motion

MAGISTRATE

	DATE	INITIAL/NO
Search Warrant Issued		
Search Warrant Return		
Summons Issued		
Summons Served		
Arrest Warrant Issued		
COMPLAINT ▶		
OFFENSE (In Complaint)		

INITIAL APPEARANCE DATE ▶

PRELIMINARY EXAMINATION OR ☐ REMOVAL HEARING: Date Scheduled ▶ / Date Held ▶

☐ WAIVED ☐ NOT WAIVED

☐ INTERVENING INDICTMENT

OUTCOME: ☐ DISMISSED

HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

UNITED STATES COURT OF APPEALS
FILED
[illegible] 23 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ATTORNEYS

U.S. Attorney or Asst.

David A. Cutner
791-0011

216

Louis Bender, Esq.
225 Bway,NYC
227 6000.

* Show last names and suffix numbers of other defendants on same indictment/information

Friedman-02, Davis-03, Sandberg-04, Berge-05,

EXCLUDABLE DELAY

DATE	(DOCUMENT NO.) PROCEEDINGS
11-8-76	Filed Indictment.......Cooper,J.
11-18-76	Deft.(atty. present) Pleads not guilty. Deft. R.O.R. Case assigned to Judge Haight for all purposes. Cannella,J.
11-23-76	P.T.C. Dft. Douglas P. Fields & Dft. F.M. Friedman both represented by Att. Louis Bender . Dft. Peter S. Davis by Att. Gary Naftale, XXXX Etc. Tentative Date of trial April 18, 1977.....Motions to be made by January 24,1976..... Haight J.
11-24-76	Filed Notice of Appearance by Louis Bender, 225 Bway,NYC Tel. 227 6000.
12-27-76	Filed Memorandum & Order. Mr. Bender may continue his joint representation of dfts. Fields & Friedman. Govt. Counsel & dfts. are directed to keep a vigilant lookout for any conflict of interest as indicated.....Haight J. (mailed notice)
2-7-77	Filed transcript of record of proceedings, dated 11-23-76

A

A- 2

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW, IN SECTION V, ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued) PAGE TWO (DOCUMENT NO.)	V. EXCLUDABLE DELAY Interval Section (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)
4-18-77	Dft. Fields & Friedman P/W/As Louis Bender & Sander Frankel. Govt. by David Gutrer AUSA, Hearin on motion to dismiss indictment.				
-19-77	Hearing Continues.				
-20-77	" "				
-21-77	" "				
-25-77	" "				
-26-77	" "				
-27-77	" "				
-28-77	" "				
-2-77	" "				
-3-77	" "				
-4-77	" " Hearing Concluded. Exchange findings of fact not later than 5/16/77 @ Noon. Oral Argument to be heard onXXXXXXXXXXXXXXXXXX 5/18/77. Trial date, if any May 31,1977......Haight J,				
-26-77	Filed Order that trial of this matter, scheduled to commence 5/31/77, is hereby stayed pending appellate resolution of the issures arising outh of the Court's order dismissing certain counts of indictment & striking certain paragraphs thereof, or until further order of this court.......Haight J.(mn)				
-26-77	Filed Order. Paragraphs 10(d)through 10(h) & 11(e) are hereby stricken from indictment,etc. Cts. 4 through 11 dismissed in their entireties.portions of ct. 1 through 3 of the indictment relating to ERD ,as indicated are dismissed as indicated.Ct. 4 of indictment dismissed as indicated. Dft. Eric Berge is severed from trial for medical reasons,as indicated.Trial of Douglas P.Fields as indicated will commence on 5/31/77 at 10:00A.M. Trial of Eric Berge on Ct. 12 of indictment will take place at a date & time to be fixed by further order of this court. All otheer motions aredenied...... .... Indictment as to dfts. Friedman,Davis & Sandberg is dismissed........Haight J. (mn)				
5-23-77	All Dfts. p/w/a's As noted above, Govt. by David Cutner & Sarah Gold AUSA AUSA. Oral Arguments in support of motions to dismiss indictments. Courts decision to be made known on all motions Wednesday, May 25,1977 @ 1:30 PM/.......Haight J.				
5-26-77	See Order of the Court, dtd. May 25,1977......Haight J.				
-3-77	Filed Opinion #45979. Motions Granted in part & Denied in part as indicated. Cts. 4-11 Dismissed in their entireties. Ct. 4 Dismissed.Ct. 6-11 as indicated dismissed. Trial of dft. will commence on 5-31-77 as indicated. all other motions denied.........Haight J. (mn)				

LETTER CODES

For identifying Periods of Excludable Delay Per 18 USC 3161(h)

- A. Examination or hearing for mental or physical incapacity (18 U.S.C. 4244).
- B. NARA Examination (28 U.S.C. 2902).
- C. State or Federal trials on other charges.
- D. Interlocutory Appeals.
- E. Hearings on pretrial motions.
- F. Transfers from other districts (per F.R.Cr.P. Rules 20, 21 & 40).
- G. Defendant Motion is actually under advisement. Period of up to 30 days is excludable per 3161(h)(1)(G).
- H. Miscellaneous Proceedings: Probation or Parole revocation, Deportation, Extradition.
- L. Prosecution deferred by mutual agreement.
- M. Unavailability of defendant or essential witness.
- N. Period of mental or physical incompetence of defendant to stand trial.
- O. Period of NARA Commitment or Treatment.
- P. Superseding indictment and/or new charges.
- R. Defendant awaiting trial of Co-defendant when no severance has been granted.
- T. Continuances Granted per 3161(h)(8) (i.e. ends of justice or complexity of case outweighs defendants interests).
- U. Time between guilty plea and plea withdrawal.
- W. Grand Jury indictment extended per 3161(b).

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

B

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs FIELDS, DOUGLAS, et al A 3

Page # 3

76	1022	01
Yr.	Docket No.	Def.

DATE	PROCEEDINGS (continued) Haight, J. (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
7-7-77	Filed opinion #46139, on motion by government for rehearing on prior opinion dated 6-2-77 and reconsideration on two aspects in response to deft's motion to dismiss indictment, motion for rehearing is granted and the Court adheres to its prior opinion and order.....Haight, J. m/n				
7-5-77	Filed transcript of record of proceedings, dated 4-26-77, 27, 28 5-2, 3, -77				
7-5-77	Filed transcript of record of proceedings, dated 4-18-19-20-77 4-21-25-77				
7-5-77	Filed transcript of record of proceedings, dated 5-4-23-77				
8-2-77	Filed Gov't Notice of Appeal to USCA, 2nd circuit from pre-trial order dated 6-3-77. m/copy				
8-23-77	Filed deft. Fields & Friedman's memorandum of law in support of various motions.				
8-23-77	Filed defendant Fields & Friedman's notice of motion for dismiss indictment. Ret at a place & time to be set by the Court.				
8-23-77	Filed deft. Fields & Friedman's memorandum of law in reply to Govt. affdavt. & memorandum opposing various motions.				
8-23-77	Filed affidavit of Louis Bender in reply to Govt. papers.				
8-23-77	Filed deft. Friedman & Fields' proposed findings Of fact and conclusions of law.				
8-23-77	Filed affidavit of Louis Bender in opposition to Govt. motion requesting rehearing of order striking & dismissing.				
8-23-77	Filed Govt's memorandum of law in opposition to defts. motion to dismiss etc.				
8-23-77	Filed affdvt. of David A. Cutner, A.U.S.A., in opposition to motion.s				
8-23-77	Filed Govt. proposed findings of fact & conclusions of law.				
8-23-77	Filed Govt's. supplemental memorandum in opposition to motion to dismiss.				
8-23-77	Filed Govt's. notice of motion for rehearing of defts' motion to dismiss.				
		Interval	Start Date	Ltr.	T

A 4

CRIMINAL DOCKET - U.S. District Court

PETTY OFFENSE Po ☐
OTHER MINOR OFFENSE Mo ☐
OTHER MISDEMEANOR Mis ☐
FELONY Fel ☒

JUDGE/MAGISTRATE Assigned: 0208 1 0865
District | Office | Disp./Sentence

U.S. vs. FRIEDMAN, FREDERICK M.
(LAST, FIRST, MIDDLE)

JUVENILE ☐

Case Filed Mo Day: 11 08
No. of Defs: * 05

76 1022 02
Yr. | Docket No. | Def.

U.S. MAG CASE NO. ▶

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Consp. to viol. Federal Securities Laws	1
15:77q(a)&77x	Fraud in the offer & sale of securities	2
18:1001	Making false statements to the S.E.C.	3
15:78n(a)&78ff	Distributing false proxy statements	4, 5&11
18:1343	Wire fraud	6
18:1341	Mail fraud	7-10

SUPERSEDING COUNTS

FILED
AUG 23 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BAIL • RELEASE
☐ Denied
AMT Set
$ 000
Dato
☐ Bail Not Made
☐ Status Changed (See Docket)
— Fugitive
— Pers. Recog
— PSA
conditions
— 10% Deposit
— Surety Bond
— Collateral
— 3rd Pty Cust
☐ Other

II. KEY DATES & INTERVALS

ARREST or
U.S. Custody Began
Summons Served
First Appearance

High Risk Date
In Charging District

INDICTMENT ☒
Information ☐
11-8-76
Indict. Waived ☐
Superseding ☐ Indict/Info ☐

ARRAIGNMENT
11-18-76
1st Plea
11-18-76
Final Plea

Trial Set For
4-18-77
☒ NG ☐ G ☐ NOL
G. Plea W/Drawn
☐ NG ☐ G ☐ NOL

TRIAL
Voir Dire ☐
Trial Began ☐ J ☐ N J
Trial Ended

SENTENCE
Disposition of Charges
5-26-77
☐ Convicted
☐ Acquitted
☒ Dismissed:
☐ On All Charges
☐ On Lesser * Offense(s)
☐ NOP. ☒ VP
☐ On Government's Motion

MAGISTRATE

		DATE	INITIAL/NO.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued			
COMPLAINT ▶			
OFFENSE (In Complaint)			

INITIAL APPEARANCE DATE ▶
PRELIMINARY EXAMINATION OR ☐ REMOVAL HEARING: Date Scheduled ▶ / Date Held ▶
☐ WAIVED ☐ NOT WAIVED
☐ INTERVENING INDICTMENT
INITIAL/NO.
Tape Number

OUTCOME:
☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.
David A. Cutner
791-0011

216

ATTORNEYS Defense ☐ CJA ☒ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD
Louis Bender
225 Bway, NYC
227 6000

* Show last names and suffix numbers of other defendants on same indictment/information.

~~XXXX~~ Fields-01, Davis-03, Sandberg-04, Berge-05,

EXCLUDABLE DELAY (a) (b) (c) (d)

DATE	(DOCUMENT NO.) PROCEEDINGS
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11-18-76	Deft. (atty. present) Pleads not guilty. Deft. R.O.R. Case assigned to Judge Haight for all purposes.
11-23-76	P.T.C. Dft. F.M. Friedman represented by At[illegible] Bender Motions to be made by January 24, 1977. TentativeDate for trialApril 18, 1977.....Haight J.
11-24-76	Filed Notice of Appearance by Louis Bender, 225 Bway, NYC Tel. 227 6000.
12-27-76	Filed Memorandum & Order. Mr. Bender may continue his joint representation of dfts. Fields & Friedman. Govt. Counsel & dfts. are directed to keep a vigilant lookout for any conflict of interst as indicated.....Haight J. (mailed notice)
2-7-77	Filed transcript of record of proceedings, dated 11-23-76
7-5-77	Filed transcript of record of proceedings, dated 4-26, 27, 28-77, 5-2-3-77
7-5-77	Filed transcript of record of proceedings, dated 4-18-19-21-77, 4-21-25-77

FORM AO 256

D

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW, IN SECTION V, ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued) PAGE TWO (DOCUMENT NO.)	V. EXCLUDABLE DELAY Interval Section # (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)
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4-19-77	Govt. by David Gutrer AUSA, Hearing on motion to dismiss				
4-20-77	Xindictment.				
4-21-77	Hearing Continues				
4-25-77	" "				
4-26-77	" "				
4-27-77	" "				
4-28-77	" "				
5-2-77	" "				
5-3-77	" "				
5-4-77	" " Hearing concluded Exchange findings of fact not later than 5/16/77 @ Noon. Oral Argument to be heard on 5/18/77. Trial date, if any May 31,1977...........Haight J.				
5-26-77	Filed Order that trial of this matter, scheduled to commence 5/31/77, is hereby stayed pending appellate resolution of the issures arising outh of the Court's order dismissing certain counts of indictment & striking certain paragraphs thereof, or until further order of this court.......Haight J. (mn)				
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5-23-77	All Dfts. p/w/a's As noted above, Govt. by David Cutner & Sarah Gold AUSA AUSA. Oral Arguments in support of motions to dismiss indictments. Courts decision to be made known on all motions Wednesday, May 25,1977 @ 1:30 PM/.......Haight J.				
5-26-77	See Order of the Court, dtd. May 25,1977......Haight J.				
5-26-77	Dft. Friedman,Davis &Sandbert Indictment dismissed by EMK Court Order this date......Haight.J.				
6-3-77	Filed Opinion #45979. Motions Granted in part & Denied in part as indicted. Cts. 4-11 Dismissed in their entireties. as indicated. Indictment as to Dft. dismissed.Etc....... Haight J. (mn)				
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- F. Transfers from other districts (per F.R.Cr.P. Rules 20, 21 & 40).
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- H. Miscellaneous Proceedings: Probation or Parole revocation, Deportation, Extradition.
- I. Prosecution deferred by mutual agreement.
- M. Unavailability of defendant or essential witness.
- N. Period of mental or physical incompetence of defendant to stand trial.
- O. Period of NARA Commitment or Treatment.
- P. Superseding indictment and/or new charges.
- R. Defendant awaiting trial of Co-defendant when no severance has been granted.
- T. Continuances Granted per 3161(h) (8) i.e. ends of justice or complexity of case outweighs defendants interests).
- U. Time between guilty plea and plea withdrawal.
- W. Grand Jury indictment extended per 3161 (b).

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

E

A 6

CRIMINAL DOCKET - U.S. District Court

☐ PETTY OFFENSE PO
☐ OTHER MINOR OFFENSE MO
☐ OTHER MISDEMEANOR Mis
☒ FELONY Fel

JUDGE/MAGISTRATE Assigned		Disp./Sentence
0208	1	0865
District	Office	

U.S. vs DAVIS, PETER S.
(LAST, FIRST, MIDDLE)

☐ JUVENILE

Case Filed Mo. Day: 11 08
No. of Def's: * 05

Yr	Docket No	Def
76	1022	03

U.S. MAG CASE NO. ▶

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15:78n(a)&78ff	Distributing false proxy statements	4&5

SUPERSEDING COUNTS

OF APPEALS
23 1977
A. DANIEL F

BAIL • RELEASE
☐ Denied
AMT Set
$ 000
Date
☐ Bail Not Made
☐ Status Changed (See Docket)
☐ Fugitive
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conditions
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Summons Served:
First Appearance:

INDICTMENT ☒ Information ☐
High Risk Date:
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Indict. Waived ☐
In Charging District
Superseding ☐ Indict/Info ☐

ARRAIGNMENT
11-18-76
1st Plea: 11-18-76 ☒ NG ☐ G ☐ NOL
G. Plea W/Drawn
Final Plea: ☐ NG ☐ G ☐ NOL

TRIAL
Trial Set For: 4-18-77
Voir Dire ☐
Trial Began ☐ J ☐ NJ
Trial Ended

SENTENCE
Disposition of Charges: 5-26-77
☐ Convicted
☐ Acquitted
☒ Dismissed
☐ On All Charges
☐ On Lesser Offense(s)
☐ WOP ☒ WP
☐ On Governm'ts Motion

MAGISTRATE

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	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued			
COMPLAINT ▶			
OFFENSE (In Complaint)			

INITIAL APPEARANCE DATE ▶
PRELIMINARY EXAMINATION OR ☐ REMOVAL HEARING: Date Scheduled ▶ / Date Held ▶
☐ WAIVED ☐ NOT WAIVED
☐ INTERVENING INDICTMENT
INITIAL/NO.
Tape Number

OUTCOME:
☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.
David A. Cutner
791-0011
216

ATTORNEYS Defense: ☐ CJA ☒ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ PD ☐ CD
Gary Naftalis, Esq.
Orans Eisen & Polstein, 1 Rockefeller Plaza, NYC 10
Tel. 586 2211.
-719

* Show last names and suffix numbers of other defendants on same indictment/information:
Fields-01, Friedman-02, Sandberg-04, Berge-05,

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
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11-23-76	P.T.C Dft. Peter S. Davis by Atty. Gary Naftale, Motions to be made by January 24, 1976. Tentative date for trial April 18, 1977......Haight J.	
11-24-76	Filed Notice of Appearnace by Orans Eken & Polstein, 1 Rockefeller Plaza NYC 10020 586 2211.	
2-1-77	Filed Dfts. Notice of Motion & Affdvt. for an order dismissing the Indictment.	
2-1-77	Filed Dfts. Memorandum of Law in support of Pre Trial Motions.	
2-7-77	Filed transcript of record of proceedings, dated 11-23-76	

Continued

FORM AO 256

F

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW IN SECTION V. ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued) PAGE TWO (DOCUMENT NO.)	V. EXCLUDABLE DELAY Interval Section (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)
3-28-77	Filed deft's reply memorandum of law in support of pre-trial motions.				
4-18-77	Dft. Davis represented by Gary Naftalis, Govt. by David Gutrer AUSA. Hearing on motion to dismiss indictment.				
4-19-77	Hearing Continues.				
4-20-77	" "				
4-21-77	" "				
4-25-77	" "				
4-26-77	" "				
4-27-77	" "				
4-28-77	" "				
5-2-77	" "				
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5-4-77	" " Hearing concluded. Exchange findings of fact not later than 5/16/77 @ Noon. Oral Argument to be heard on 5/18/77. Trial date, if any May 31, 1977.....Haight J.				
5-26-77	Filed Order that trial of this matter, scheduled to commence 5/31/77, is hereby stayed pending appellate resolution of the issures arising outh of the Court's order dismissing certain counts of indictment & striking certain paragraphs thereof, or until further order of this court.......Haight J. (mn)				
5-26-77	Filed Order. Paragraphs 10(d) through 10(h) & 11(e) are hereby stricken from indictment, etc. Cts. 4 through 11 dismissed in their entireties, portions of ct. 1 through 3 of the indictment relating to ERD, as indicated are dismissed as indicated. Ct. 4 of indictment dismissed as indicated. Dft. Eric Berge is severed from trial for medical reasons, as indicated. Trial of Douglas P. Fields as indicated will commence on 5/31/77 at 10:00A.M. Trial of Eric Berge on Ct. 12 of indictment will take place at a date & time to be fixed by further order of this court. All otheer motions aredenied...... .... Indictment as to dfts. Friedman, Davis & Sandberg is dismissed........Haight J. (mn)				
5-23-77	All Dfts. p/w/a's As noted above, Govt. by David Cutner & Sarah Gold AUSA AUSA. Oral Arguments in support of motions to dismiss indictments. Courts decision to be made known on all motions Wednesday, May 25, 1977 @ 1:30 PM/.......Haight J.				
5-26-77	See Order of the Court, dtd. May 25, 1977......Haight J.				
5-26-77	Dft. Friedman, Davis & Sandbert Indictment dismissed by ~~XXX~~ Court Order this date......Haight. J.				
6-3-77	Filed Opinion #45979. Motions Granted in part & Denied in part as indicated. Cts. 4-11 Dismissed in their entireties as indicated...Indictment Dismissed as to Dft., Etc. ....Haight J. (mn)				
7-5-77	Filed transcript of record of proceedings, dated 4-26, 27, 28, -77 5-2-3-77				
7-5-77	Filed transcript of record of proceedings, dated 4-18, 19, 20-77 4-21-25-77				
7-5-77	Filed transcript of record of proceedings, dated 5-4, 23-77				

LETTER CODES
For identifying Periods of Excludable Delay Per 18 U.S.C. 3161(h)

- A. Examination or hearing for mental or physical incapacity (18 U.S.C. 4244).
- B. NARA Examination (28 U.S.C. 2902).
- C. State or Federal trials on other charges.
- D. Interlocutory Appeals.
- E. Hearings on pretrial motions.
- F. Transfers from other districts (per F.R.Cr.P. Rules 20, 21 & 40).
- G. Defendant Motion is actually under advisement. Period of up to 30 days is excludable per 3161(h) (1) (G).
- H. Miscellaneous Proceedings: Probation or Parole revocation, Deportation, Extradition.
- I. Prosecution deferred by mutual agreement.
- M. Unavailability of defendant or essential witness.
- N. Period of mental or physical incompetence of defendant to stand trial.
- O. Period of NARA Commitment or Treatment.
- P. Superseding indictment and/or new charges.
- R. Defendant awaiting trial of Co-defendant when no severance has been granted.
- T. Continuances Granted per 3161(h) (8) (i.e. ends of justice or complexity of case outweighs defendants interests)
- U. Time between guilty plea and plea withdrawal.
- W. Grand Jury indictment extended per 3161 (b).

PAYMENTS		DATE	RECEIPT NUMBER	C.D. NUMBER

G

PAGE 3 U.S.A. vs. PETER S. DAVIS(deft. no. 3)- 76 Crim 1022 CSH

A 8

DATE	PROCEEDINGS
-23-77	Filed deft. DAvis' affidavit in support of motion to dismiss indictment.
-23-77	Filed post hearing factual and legal memorandum of deft. Peter S. Davis.
8-23-77	Filed letter dated 6-20-77 to Judge Haight from Gary Naftalis.

H

A 9

CRIMINAL DOCKET - U.S. District Court

PETTY OFFENSE PO ☐
OTHER MINOR OFFENSE MO ☐
OTHER MISDEMEANOR Mis ☐
FELONY Fel ☒

JUDGE/MAGISTRATE Assigned: 0208 1 0865
District | Office | Disp./Sentence

U.S. vs **SANDBERG, ALAN E.**
(LAST, FIRST, MIDDLE)

JUVENILE ☐

Case Filed Mo. 11 Day 08
No. of Def's *05

76 1022 04
Yr. | Docket No. | Def.

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
15:78n(a)&78ff	Distributing false proxy statements	5
18:1343	Wire fraud	6
18:1341	Mail fraud	7-10

SUPERSEDING COUNTS

U.S. MAG. CASE NO.

BAIL • RELEASE
☐ Denied
AMT Set $ 000
☐ Fugitive
☐ Pers. Recog.
☐ PSA
conditions
☐ 10% Deposit
☐ Surety Bond
☐ Collateral
☐ 3rd Prty Cust.
☐ Other
Date
☐ Bail Not Made
☐ Status Changed (See Docket)

II. KEY DATES & INTERVALS

ARREST or U.S. Custody Began:
Summons Served:
First Appearance:
High Risk Date:
INDICTMENT ☒ Information ☐: 11-8-76
Indict. Waived ☐
Superseding Indict/Info ☐
In Charging District
ARRAIGNMENT: 11-18-76
1st Plea: 11-18-76 ☒ NG ☐ G ☐ NOL
Final Plea: ☐ NG ☐ G ☐ NOL
G. Plea (W. Drawn)
Trial Set For: 4-18-77
TRIAL Voir Dire ☐
Trial Began ☐ J ☐ N ☐ J
Trial Ended
SENTENCE
Disposition of Charges: 5-26-77
☐ Convicted
☐ Acquitted
☒ Dismissed:
☐ On All Charges
☐ On Lesser Offense(s)
☐ WOP ☒ SP
☐ On Government's Motion

MAGISTRATE

		DATE	INITIAL/NO.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued			
COMPLAINT			
OFFENSE (In Complaint)			

INITIAL APPEARANCE DATE
PRELIMINARY EXAMINATION OR ☐ REMOVAL HEARING: Date Scheduled / Date Held
☐ WAIVED ☐ NOT WAIVED
☐ INTERVENING INDICTMENT
Tape Number
INITIAL/NO.
OUTCOME:
☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

ATTORNEYS
Defense: ☐ CJA ☒ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

U.S. Attorney or Asst.
David A. Cutner
791-0011

216

Norman Ostrow, Esq.
Grand & Ostrow
375 Park Ave. NYC
Tel. 832 3611

-772

* Show last names and suffix numbers of other defendants on same indictment/information.

Fields-01, Friedman-02, Davis-03, Berge-05,

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
11-8-76	Filed Indictment.......Cooper, J.	
11-18-76	Deft. (Atty. present) Pleads not guilty. R.O.R. Case assigned to Judge Haight for all purposes. Cannella, D.	
11-23-76	P.T.C. Dft. Alan E. Sandberg by Att. Norman Ostrow, Motions to be made by January 24, 1977. Tentative date for trial April 18, 1977.......Haight J.	
11-24-76	Filed Notice of Appearance by Norman S. Ostrow, % Grand & Ostrow, 375 Park Ave. NYC 832 3611.	
1-31-77	Filed Dfts. Notice of Motion & Affdvt. for order dismissing cts. 7, 8, 9 & 10 of the indictment. ~~XXXX~~	
1-31-77	Filed Dfts. Motion for Bill of Particulars & Affdvt.	
1-31-77	Filed Memorandum of Alan E Sandberg in support of his motion to dismiss cts. 7, 8, 9 & 10 of the indictment.	
1-31-77	Filed Memorandum of Alan E. Sandberg in suppor of his motion to sever Ct. 12 of the indictment & all other counts in which he is not named.	

FORM AO 256

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A 10

PPOSITE THE APPLICABLE DOCKET ENTRIES SHOW. IN SECTION V. ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued) PAGE TWO (DOCUMENT NO.)	V. EXCLUDABLE DELAY Interval Section ii (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)
-7-77	Filed transcript of record of proceedings, dated 11-23-76				
-18-77	**Dft. Sandberg represented by Frank Wright,Govt. by David Gutrer AUSA,Hearin on motion to dismiss indictment.**				
-19-77	**Hearing continues**				
-20-77	" "				
-21-77	" "				
-25-77	" "				
-26-77	" "				
-27-77	" "				
-28-77	" "				
-2-77	" "				
-3-77	" "				
-4-77	" " **Hearing concluded. Exchange findings of fact Not later than May 16,1977 @ Noon. Oral Argument to be heard on' 5/18/77. Trial Date, if any, 5/31/77......Haight J.**				
5-26-77	Filed Order that trial of this matter, scheduled to commence 5/31/77, is hereby stayed pending appellate resolution of the issures arising outh of the Court's order dismissing certain counts of indictment & striking certain paragraphs thereof, or until further order of this court.......Haight J.(mn)				
5-26-77	Filed Order. Paragraphs 10(d)through 10(h) & 11(e) are hereby stricken from indictment,etc. Cts. 4 through 11 dismissed in their entireties.portions of ct. 1 through 3 of the indictment relating to ERD ,as indicated are dismissed as indicated.Ct. 4 of indictment dismissed as indicated. Dft. Eric Berge is severed from trial for medical reasons,as indicated.Trial of Douglas P.Fields as indicated will commence on 5/31/77 at 10:00A.M. Trial of Eric Berge on Ct. 12 of indictment will take place at a date & time to be fixed by further order of this court. All otheer motions aredenied...... .... Indictment as to dfts. Friedman,Davis & Sandberg is dismissed........Haight J. (mn)				
5-23-77	All Dfts. p/w/a's As noted above, Govt. by David Cutner & Sarah Gold AUSA AUSA. Oral Arguments in support of motions to dismiss indictments. Courts decision to be made known on all motions Wednesday, May 25,1977 @ 1:30 PM/.......Haight J.				
5-26-77	See Order of the Court, dtd. May 25,1977......Haight J.				
5-26-77	Dft. Friedman,Davis &Sandbert Indictment dismissed by ~~EMM~~ Court Order this date......Haight.J.				
6-3-77	Filed Opinion #45079. Motions Granted in part & denied in part as indicated. Cts. 4-11 Dismissed in their entireties as. . indicated.....Indictment Dismissed as to Dft......Etc....... ....Haight J. (mn)				
7-5-77	Filed transcript of record of proceedings, dated 4-26, 27, 28-77 5-2-3,-77				
7-5-77	Filed transcript of record of proceedings, dated 4.18-19-20-77 4-21-25-77				
7-5-77	[illegible] 5-4-23-77				

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

LETTER CODES

For identifying Periods of Excludable Delay Per 18 USC 3161(h)

- A. Examination or hearing for mental or physical incapacity (18 U.S.C. 4244).
- B. NARA Examination (28 U.S.C. 2902).
- C. State or Federal trials on other charges.
- D. Interlocutory Appeals.
- E. Hearings on pretrial motions.
- F. Transfers from other districts (per F.R.Cr.P. Rules 20, 21 & 40).
- G. Defendant Motion is actually under advisement. Period of up to 30 days is excludable per 3161(h) (1) (G).
- H. Miscellaneous Proceedings: Probation or Parole revocation, Deportation, Extradition.
- I. Prosecution deferred by mutual agreement.
- M. Unavailability of defendant or essential witness.
- N. Period of mental or physical incompetence of defendant to stand trial.
- O. Period of NARA Commitment or Treatment.
- P. Superseding indictment and/or new charges.
- R. Defendant awaiting trial of Co-defendant when no severance has been granted.
- T. Continuances Granted per 3161(h) (8) (i.e. ends of justice or complexity of case outweighs defendants interests).
- U. Time between guilty plea and plea withdrawal.
- W. Grand Jury indictment extended per 3161 (b).

76 Cr. 1022 CSH

76 Cr. 1022 CSH U.S.A. VS. ALAN E. SANDBERG
(Deft. no. 4)

DATE	PROCEEDINGS
8-23-77	Filed affidavit of Norman Ostrow to dismiss indictment(in support of motion)
8-23-77	Filed reply memorandum of Alan E. Sandberg in support of motion to dismiss.
8-23-77	Filed memorandum of law re SEC's criminal reference being invalid.
8-23-77	Filed deft. SANDBERG's post hearing reply memorandum in support of motion to dismiss.

A 12

CRIMINAL DOCKET - U.S. District Court

PETTY OFFENSE PO ☐
OTHER MINOR OFFENSE MO ☐
OTHER MISDEMEANOR Mis ☐
FELONY Fel ☒

JUDGE/MAGISTRATE Assigned: District 0208 Office 1 — Disp./Sentence 0865

U.S. vs. BERGE, ERIC (LAST, FIRST, MIDDLE)

JUVENILE ☐

Case Filed Mo. 11 Day 08 — No. of Defts *05

Yr. 76 Docket No. 1022 Def. 05

U.S. MAG CASE NO

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
15:78n(a)&78ff	Distributing false proxy statements	5
18:1001	Making false statements to the S.E.C.	12

SUPERSEDING COUNTS

BAIL • RELEASE: ☐ Denied; AMT Set $ 000; Date; ☐ Bail Not Made; ☐ Status Changed (See Docket); ☐ Fugitive; ☐ Pers. Recog; ☐ PSA; Conditions: ☐ 10% Deposit; ☐ Surety Bond; ☐ Collateral; ☐ 3rd Pty Cust; ☐ Other

II. KEY DATES & INTERVALS

ARREST or: U.S. Custody Began; Summons Served; First Appearance; High Risk Date; In Charging District

INDICTMENT ☒ Information ☐ 11-8-76; Indict. Waived ☐; Superseding ☐ Indict/Info ☐

ARRAIGNMENT 11-18-76; 1st Plea 11-18-76 ☒ NG ☐ G ☐ NOL; G. Plea W/Drawn; Final Plea ☐ NG ☐ G ☐ NOL

TRIAL: Trial Set For 4-18-77; Voir Dire; Trial Began; Trial Ended

SENTENCE: Disposition of Charges; ☐ Convicted; ☐ Acquitted; ☐ Dismissed: ☐ NOP ☐ WP; ☐ On Government motion; ☐ On All Charges; ☐ On Lesser Charge(s)

MAGISTRATE

		DATE	INITIAL/NO.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued			
COMPLAINT			
OFFENSE (In Complaint)			

INITIAL APPEARANCE DATE
PRELIMINARY EXAMINATION OR ☐ REMOVAL HEARING: Date Scheduled; Date Held
☐ WAIVED ☐ NOT WAIVED
☐ INTERVENING INDICTMENT
Tape Number
OUTCOME: ☐ DISMISSED; ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT; ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

ATTORNEYS — Defense: ☐ CJA ☒ Ret ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

U.S. Attorney or Asst.
David A. Cutner
791-0011

216

John Tigue, Esq.
Kostellanetz & Ritholz
80 Pine St.NYC 422 4030

1282

* Show last names and suffix numbers of other defendants on same indictment information:

XXX Fields-01, Friedman-02, Davis-03, Sandberg-04,

EXCLUDABLE DELAY

DATE (DOCUMENT NO.)	PROCEEDINGS
11-8-76	Filed Indictment........Cooper,J.
11-18-76	Deft.(atty. present) Pleads not guilty. R.O.R. Case assigned to Judge Haight for all purposes. Cannella,J.
11-23-76	P.T.C. Dft. Eric Berge by Att. John Tigue. Motions to be made by January 24,1977. Tenative date for trial April 18,1977......Haight J.
11-23-76	Filed Notice of Appearance by J.Tigue Z Kostelanetz & Ritholz,80 Pine St. NYC Tel. 422 4030.
1-31-77	Filed Dft. Bergerge Notice of Motion[illegible] of Particulars & Discovery & Inspection.
1-31-77	Filed Dfts. Notice of Motions for Sev[illegible] Pur. to Rules * & 14 & a transfer of the Trial of Eric Berge Pur. to Rule 21(b).
1-31-77	Filed Notice of Motions for an order dismissing the Indictment in Whole or in part pur.to Rule 7(c).

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW. IN SECTION V. ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued) PAGE TWO DOCUMENT NO.	V. EXCLUDABLE DELAY Interval Section # (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)
1-31-77	Filed Dfts. Notice of Motion for Court Appointed Physician.				
1-31-77	Filed Memorandum of Law in support of Dfts. Pre Trial Motions for a Bill of Particulars & Discovery & inspection.	XXXXX			
1-31-77	Filed Memorandum of Law in support of Dfts. Pre Trial Motions to dismiss the indictment in whole or in part pur. to Rule 7(c)				
1-31-77	Filed Memorandum of Law in support of Dfts. Pre Trial Motions for severance pur. to Rules & & 14 & a Transfer of the Trial of Eric Berge Pur. to Rule 21(b).				
2-7-77	Filed transcript of record of proceedings, dated 11-23-76				
3/16/77	Filed Dfts Notice of Motion for an Order dismissing the indictment for prejudicial pre indictment delay.				
3/16/77	Filed Memorandum of Law in support of Dfts. motion for an order dismissing the indictment for prejudical pre indictment delay,				
3-28-77	Filed affdvt. of Bruce I. Hochman, Atty. for the deft. and reply memorandum in support of deft's pre-trial motions filed 1-31-77.				
4-14-77	Dft. Eric Berge Not Present represented by his counsel Atty. John Tigue, Govt. by David Gutner AUSA, Dft. Berge's application to be severed from the Trial for Medical Reasons is granted by by the Court.......Haight J.				
4-15-77	Filed Order that Dr. Fishman directed to examine dft. on 3/17/77 as indicated, & said physician shall submit in writing report upon completion of his examination ,Etc. Haight J. (mn)	xxxxx			
-18-77	Dft. Berge represented by John Tigue Govt by David Gutere, AUSA Hearing on Motion to dismiss Indictment.				
-19-77	Hearing Continues.				
-20-77	" "				
-21-77	" "				
-25-77	" "				
-26-77	" "				
-27-77	" "				
-28-77	" "				
-2-77	" "				
-3-77	" "				
-4-77	" " Hearing Concluded. Exchange findings of fact Not later than 5/16/77 @ Noon. Oral Argument to be heard on 5/18/77. Trial date, if any 5/31/77.......Haight J.				

(cont'd)

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

LETTER CODES
For identifying Periods of Excludable Delay Per 18 U.S.C. 3161(h)

- A. Examination or hearing for mental or physical incapacity (18 U.S.C. 4244).
- B. NARA Examination (28 U.S.C. 2902).
- C. State or Federal trials on other charges.
- D. Interlocutory Appeals.
- E. Hearings on pretrial motions.
- F. Transfers from other districts (per F.R.Cr.P. Rules 20, 21 & 40).
- G. Defendant Motion is actually under advisement. Period of up to 30 days is excludable per 3161(h) (1) (G).
- H. Miscellaneous Proceedings: Probation or Parole revocation, Deportation, Extradition.
- I. Prosecution deferred by mutual agreement.
- M. Unavailability of defendant or essential witness.
- N. Period of mental or physical incompetence of defendant to stand trial.
- O. Period of NARA Commitment or Treatment.
- P. Superseding indictment and/or new charges.
- R. Defendant awaiting trial of Co-defendant when no severance has been granted.
- T. Continuances Granted per 3161(h) (8) (i.e. ends of justice or complexity of case outweighs defendants interests).
- U. Time between guilty plea and plea withdrawal.
- W. Grand Jury indictment extended per 3161 (b).

M

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

A 14

BERGE, ERIC

76	1022	05
Yr.	Docket No.	Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
5-26-77	Filed Order that trial of this matter, scheduled to commence 5/31/77, is hereby stayed pending appellate resolution of the issures arising outx of the Court's order dismissing certain counts of indictment & striking certain paragraphs thereof, or until further order of this court.......Haight J.(mn)				
5-26-77	Filed Order. Paragraphs 10(d)through 10(h) & 11(e) are hereby stricken from indictment,etc. Cts. 4 through 11 dismissed in their entireties.portions of ct. 1 through 3 of the indictment relating to ERD ,as indicated are dismissed as indicated.Ct. 4 of indictment dismissed as indicated. Dft. Eric Berge is severed from trial for medical reasons,as indicated.Trial of Douglas P.Fields as indicated will commence on 5/31/77 at 10:00A.M. Trial of Eric Berge on Ct. 12 of indictment will take place at a date & time to be fixed by further order of this court. All otheer motions aredenied...... .... Indictment as to dfts. Friedman,Davis & Sandberg is dismissed........Haight J. (mn)				
5-23-77	All Dfts. p/w/a's As noted above, Govt. by David Cutner & Sarah Gold AUSA AUSA. Oral Arguments in support of motions to dismiss indictments. Courts decision to be made known on all motions Wednesday, May 25,1977 @ 1:30 PM/.......Haight J.				
5-26-77	See Order of the Court, dtd. May 25,1977......Haight J.				
6-3-77	Filed Opinion #45979. Motions Granted in part & denied in part as indicated. Cts. 4-11 Dismissed in their entireties as indicated. XXXXXXXXXXXXXXi Dft. Berge is severed from trial for medical reasons,etc. Trial of Dft. on Ct. 12 is to be fixed by further order ofthe court. All other motions denied........Haight J. (mn)				
7-5-77	Filed transcript of record of proceedings, dated 4-26-27-28-77				
7-5-77	Filed transcript of record of proceedings, dated 5-2-3-77 4-18-19-26-77 4-21,25-77				
7-5-77	Filed transcript of record of proceedings, dated 5-4-23-77				
8-23-77	Filed deft. Berge's affidavit joining in motion to dismiss.				
8-23-77	Filed deft. Berge's proposed findins & conclusions.				
8-23-77	Filed letter to Judge Haight from John Tigue, Jr. dated 5-24-77				

N

A TRUE COPY
RAYMOND M. BURGHARDT, CLERK
By
Deputy Clerk

MC:alc
11-173

A 15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

76 CRIM. 1022

UNITED STATES OF AMERICA :

- v - :

:

DOUGLAS P. FIELDS,
FREDERICK M. FRIEDMAN, :
PETER S. DAVIS,
ALAN E. SANDBERG, and :
ERIC BERGE,

Defendants. :

- - - - - - - - - - - - - - - - - - -x

INDICTMENT

76 Cr.

U. S. DISTRICT COURT
FILED
NOV 8 1976
S. D. OF N. Y.

The Grand Jury charges:

COUNT ONE

1. At all times material to this Indictment, TDA Industries, Inc. ("TDA"), previously known as Teledata, Inc., was a publicly held corporation located at 122 East 42nd Street, New York, New York, and its securities were traded over the counter.

2. At all times material to this Indictment, Westcalind Corp. ("Westcalind"), previously known as Monarch Electronics International ("Monarch"), was a publicly held corporation located at 122 East 42nd Street, New York, New York, and TDA was its majority and controlling shareholder.

3. At all times material to this Indictment, DOUGLAS P. FIELDS, the defendant, was President and Chairman of the Board of Directors of TDA and Westcalind.

4. At all times material to this Indictment, FREDERICK M. FRIEDMAN, the defendant, was Financial Vice-President, Secretary, Treasurer and a Director of TDA, and Treasurer and a Director of Westcalind.

MICROFILM
NOV 0 8 1976

5. At all time material to this Indictment, PETER S. DAVIS, the defendant, was an attorney admitted to the Bar of the State of New York, and a member of the law firm of Davis O'Sullivan Weil & Wolff, General Counsel to TDA.

6. At all times material to this Indictment, ALAN E. SANDBERG, the defendant, was a former officer and director of TDA.

7. At all times material to this Indictment, ERIC BERGE, the defendant, was Executive Vice-President and a Director of Westcalind.

The Conspiracy

8. From on or about January 1, 1971, up to and including December 31, 1971, in the Southern District of New York, DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN, and PETER S. DAVIS, the defendants, and Alan E. Sandberg, Thomas Zammas, and George Georges, named herein as co-conspirators but not as defendants, and other persons to the Grand Jury known and unknown, unlawfully, wilfully, and knowingly did combine, conspire, confederate, and agree together and with each other to commit offenses against the United States and to violate Title 15, United States Code, Sections 77q(a) and 77x.

Object of the Conspiracy

9. It was a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly, in the offer and sale of securities, to wit, common stock of TDA, by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly would and did (1) employ a device, scheme, and artifice to defraud, (2) obtain money and property by means of untrue statements of

material fact and omission to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (3) engage in transactions, practices, and courses of business which would and did operate as a fraud and deceit upon purchasers of said stock.

Means of the Conspiracy

10. Among the means by which said defendants and their co-conspirators would and did carry out the said conspiracy were the following:

(a) In or about November 1971, defendant FIELDS would and did attempt to raise and maintain the price of TDA common stock at artificially high and inflated prices up to and including November 10, 1971, the date of a public offering of TDA common stock owned by certain shareholders (the "selling shareholders"), including defendant DAVIS' law firm, and other shareholders to whom TDA had guaranteed that it would register for sale their shares at a price which, at a minimum, would bring to said shareholders a promised sum of money;

(b) In or about November 1971, defendant FIELDS would and did offer cash pay-offs to Thomas Zammas and other co-conspirators to induce them to make purchases of TDA common stock immediately prior to said November 10, 1971, public offering, for the purpose of causing the price of said stock to rise and be maintained at artificially high and inflated prices;

(c) In or about November 1971, defendant FIELDS would and did purchase and cause to be purchased in the open market one share of the common stock of Mastercraft Medical and Industrial Corp., a company the shares of which were publicly traded over the counter and in large number controlled by Zammas, for every four shares of TDA purchased by Zammas and other co-conspirators;

(d) On or before November 10, 1971, defendant FIELDS, FRIEDMAN and DAVIS would and did prepare and cause to be prepared a false and misleading Prospectus dated November 10, 1971, pursuant to which the selling shareholders offered to sell and sold 703,943 shares of common stock of TDA at a price of $5.00 per share, yielding proceeds of $3,519,715;

(e) Defendants FIELDS and FRIEDMAN would not and did not disclose in said Prospectus that, in March of 1971, at the time of an acquisition by Westcalind of certain trophy companies, defendant FIELDS and FRIEDMAN caused Westcalind to pay a "finder's fee" of $50,000 to Bernardi Resources Corp. ("Bernardi"), a private investment company, which had not and did not perform any service of any kind to Westcalind or anyone else in connection with said acquisition, and arranged for Bernardi to kick back $35,000 in cash to said defendants;

(f) Defendant FIELDS, FRIEDMAN and DAVIS would not and did not disclose in said Prospectus that, in April of 1971, they and each of them caused Enterprise Research & Development, Inc. ("ERD"), a private investment company, by the manner and means among others set forth below in sub-paragraphs (i) through (vi), to sell $90,000 shares of TDA common stock at a price approximately $2 per share below the market price to Bernardi, which would and did secretly kick back 70% of the gross profits to said defendants upon Bernardi's immediate re-sale of said shares in the open market:

(i) The defendants refused to permit ERD to sell its shares of TDA "lettered" stock in the open market;

(ii) The defendants introduced Bernardi to ERD, and advised ERD that they would permit a private sale of said stock to Bernardi, since Bernardi purportedly would hold said stock and not dump it on the open market;

(iii) The defendants agreed with Bernardi that it would purchase 90,000 shares of TDA common stock from ERD, that said defendants would immediately remove all restrictions on the sale of said stock, that Bernardi would immediately sell said 90,000 shares in the open market, and that Bernardi would secretly kick back 70% of the gross profits of said sale to defendants;

(iv) The defendants arranged for White Lamps, Inc., a subsidiary of TDA, to loan $100,000 to defendant DAVIS on April 16, 1971, which funds were paid to ERD as Bernardi's down payment on its purchase of 90,000 shares of TDA common stock from ERD;

(v) The defendants arranged for Bernardi to purchase 90,000 shares of TDA common stock from ERD on April 19, 1971, at $4.00 per share for a total price of $360,000; and

(vi) The defendants lifted the restrictions on the sale of said stock and permitted Bernardi to sell it in the open market on the same day, April 19, 1971, at $6 3/8 per share for a total price of $573,500, and a gross profit of $213,500;

(g) Defendants FIELDS, FRIEDMAN and DAVIS would not and did not disclose in said Prospectus that, in May of 1971, they and each of them caused ERD in the manner and means among others set forth below in sub-paragraphs (i) through (v), to sell an additional 58,744 shares of TDA common stock, and caused a group of fourteen shareholders to sell an aggregate of 64,434 shares of TDA common stock, at a price approximately $2 per share below the market price to Bernardi, which would secretly kick-back 70% of the gross profits to said defendants upon Bernardi's re-sale of said 123,178 shares in the open market:

(i) The defendants refused to permit ERD and said fourteen shareholders to sell their shares of TDA "lettered" stock in the open market;

(ii) The defendants advised ERD and said fourteen shareholders that they would permit a private sale to Bernardi, since Bernardi purportedly would hold said stock and not dump it on the open market;

(iii) The defendants agreed with Bernardi that it would purchase the said 123,178 shares of TDA common stock, that said defendants would immediately remove all restrictions on the sale of said stock, that Bernardi would immediately sell said 123,178 shares in the open market, and that Bernardi would secretly kick-back 70% of the gross profits of said sale to the defendants;

(iv) The defendants arranged for Bernardi to purchase said 123,178 shares of TDA common stock on May 3, 1971, at about $5.00 per share for a total price of $615,890; and

(v) The defendants lifted the restrictions on the sale of said stock and permitted Bernardi to sell it in the open market as follows: 50,000 shares on May 4, 1971, at $6 7/8 per share; 50,000 shares on May 4, 1971, at $7 per share; and 23,178 shares during February through April, 1972, at prices ranging from $6 1/8 to $7 1/8 per share, yielding total proceeds of $838,040, and a gross profit of $222,150.

(h) Defendants FIELDS, FRIEDMAN, and DAVIS would not and did not disclose in said Prospectus that, pursuant to the agreements set forth in paragraphs 10(f)(iii) and 10(g)(iii) hereof, Bernardi gave a promissory note dated May 12, 1971, in the amount of $284,375 to defendant FRIEDMAN, and that Bernardi paid or caused to be paid to defendants FIELDS, FRIEDMAN, and DAVIS more than $25,000 in cash during the period of April 19, 1971, to November 10, 1971.

OVERT ACTS

11. In furtherance of the conspiracy and to effect the objects thereof the defendants and their co-conspirators committed the following overt acts, among others, in the Southern District of New York:

(a) On or about November 4, 1971, defendant FIELDS met with co-conspirators Thomas Zammas and George Georges in the offices of TDA at 122 East 42nd Street, New York, New York, and offered a cash pay-off to Zammas to make purchases of TDA common stock on the open market prior to the November 10, 1971, public offering, for the purpose of causing the price of said stock to rise and be maintained at artificially high and inflated prices;

(b) At the time and place aforesaid, defendant FIELDS agreed to purchase or cause to be purchased in the open market one share of the common stock of Mastercraft Medical and Industrial Corp. ("Mastercraft") for every four shares of TDA purchased by Zammas and other co-conspirators;

(c) On or about November 5, 1971, Thomas Zammas purchased 17,500 shares of TDA on the open market;

(d) On or about the dates hereinafter set forth, co-conspirator Alan Sandberg purchased stock on the open market as follows:

Date	Stock	Number of Shares
November 5, 1971	Mastercraft	2,500
November 5, 1971	TDA	1,100
November 8, 1971	TDA	400
November 9, 1971	TDA	11,800
November 11, 1971	Mastercraft	2,900

(e) On or about November 10, 1971, defendants FIELDS, FRIEDMAN, and DAVIS filed and caused to be filed with the Securities and Exchange Commission a prospectus dated November 10, 1971, covering the sale of 703,943 shares of TDA common stock.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

12. On or about November 10, 1971, in the Southern District of New York, DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN, and PETER S. DAVIS, the defendants, unlawfully, wilfully and knowingly, in the offer and sale of securities, to wit,

common stock of TDA, by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly did (1) employ a device, scheme, and artifice to defraud, (2) obtain money and property by means of untrue statements of material fact and omission to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (3) engage in transactions, practices, and courses of business which would and did operate as a fraud and deceit upon purchasers of said stock.

13. The allegations contained in Count One of this Indictment are repeated and realleged as though fully set forth herein as constituting and describing some of the means by which defendant FIELDS, FRIEDMAN, and DAVIS committed the offense charged in paragraph 12 of this Indictment.

(Title 15, United States Code, Sections 77q(a) and 77x; Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

14. On or about November 10, 1971, in the Southern District of New York, DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN, and PETER S. DAVIS, the defendants, in a matter within the jurisdiction of a department and agency of the United States, to wit, the filing with the Securities and Exchange Commission of a prospectus covering the sale of 703,943 shares of common stock of TDA, unlawfully, wilfully, and knowingly, did conceal and cover up by trick, scheme, and device material facts, to wit,

the matters set forth in paragraphs 8 through 11 of this Indictment, which paragraphs are hereby repeated and realleged as though fully set forth herein, and did make false, fictitious and fraudulent statements and representations, and did make and use a false writing and document, to wit, the aforesaid prospectus, knowing the same to contain false, fictitious, and fraudulent statements and entries.

(Title 18, United States Code, Sections 1001 and 2.)

COUNT FOUR

The Grand Jury further charges:

15. On or about December 17, 1971, in the Southern District of New York, DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN, and PETER S. DAVIS, the defendants, unlawfully, wilfully and knowingly, by use of the mails and by means and instrumentalities of interstate commerce did solicit proxies from shareholders of TDA common stock by means of a proxy statement containing statements which, at the time and in the light of the circumstances under which said statements were made, were false and misleading with respect to material facts, and which omitted to state material facts necessary in order to make the statements therein not false and misleading.

16. The defendants did not disclose in said proxy statement the matters set forth in paragraphs 8 through 11 of this Indictment, which paragraphs are hereby repeated and realleged as though fully set forth herein.

(Title 15, United States Code, Sections 78n(a) and 78ff; 17 C.F.R. 240.14a-9; Title 18, United States Code, Section 2.)

COUNT FIVE

The Grand Jury further charges:

17. On or about December 23, 1971, in the Southern District of New York, DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN, PETER S. DAVIS, and ERIC BERGE, the defendants, unlawfully, wilfully and knowingly, by use of the mails and by means and instrumentalities of interstate commerce did solicit proxies from shareholders of Westcalind common stock by means of a proxy statement containing statements which, at the time and in the light of the circumstances under which said statements were made, were false and misleading with respect to material facts, and which omitted to state material facts necessary in order to make the statements therein not false and misleading.

18. Said defendants did not disclose in said proxy statement the matters set forth in paragraphs 8 through 11 of this Indictment, which paragraphs are hereby repeated and realleged as though fully set forth herein.

(Title 15, United States Code, Sections 78n(a) and 78ff; 17 C.F.R. 240.14a-9; Title 18, United States Code, Section 2.)

COUNT SIX

The Grand Jury further charges:

19. From on or about June 1, 1972, to on or about May 31, 1973, in the Southern District of New York, FREDERICK M. FRIEDMAN and ALAN E. SANDBERG, the defendants, unlawfully, wilfully, and knowingly, did devise and intend to devise a scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises.

20. It was a part of said scheme and artifice to defraud that, at the time of an acquisition by TDA of Eagle Roofing and Art Metal Works, defendant FRIEDMAN would and did offer a pay-off to Stuart Kreisler to accept a $100,000 "finder's fee" to be paid by TDA and to kickback $70,000 to defendant SANDBERG and an additional amount in cash to defendant FRIEDMAN.

21. It was further a part of said scheme and artifice to defraud that defendants FRIEDMAN and SANDBERG would and did prepare and cause to be prepared a series of false, fictitious, and backdated letters signed by defendant SANDBERG and Kreisler, which letters purported to show a business relationship between defendant SANDBERG and Kreisler so as to justify the payment of $70,000 of the $100,000 "finders fee" to defendant SANDBERG by Kreisler.

22. It was further a part of said scheme and artifice to defraud that, on or about the dates hereinafter set forth, defendants FRIEDMAN and SANDBERG would and did transmit and caused to be transmitted to Kreisler checks in the amounts hereinafter set forth:

Date	Amount
February 20, 1973	$75,000
February 28, 1973	$10,000
March 28, 1973	$15,000

23. It was further a part of said scheme and artifice to defraud that, on or about the dates hereinafter set forth, defendants FRIEDMAN and SANDBERG would and did receive payments from Kreisler as hereinafter set forth:

Date	Amount	Method Of Payment	Payee
February 20, 1973	$70,000	check	SANDBERG
February 28, 1973	$ 5,000	cash	FRIEDMAN
March 28, 1973	$ 7,000	cash	FRIEDMAN

24. Between on or about October 1, 1972, and on or about November 30, 1972, in the Southern District of New York, defendants FRIEDMAN and SANDBERG, unlawfully, wilfully, and knowingly, and for the purpose of executing said scheme and artifice to defraud as set forth in paragraphs 19 through 23 hereof, did transmit and cause to be transmitted by means of wire communication in interstate commerce signals and sounds, to wit, telephone conversations between defendant FRIEDMAN in New York City and Kreisler in Connecticut, concerning defendant FRIEDMAN'S offer of a payoff to Kreisler if Kreisler would accept a "finder's fee" from TDA and kick-back a substantial amount in cash to defendant FRIEDMAN.

(Title 18, United States Code, Sections 1343 and 2.)

COUNTS SEVEN THROUGH TEN

25. The allegations contained in paragraph 19 through 24 of this Indictment are repeated and realleged as though fully set forth herein.

26. On or about the dates hereinafter set forth, in the Southern District of New York, defendants FRIEDMAN and SANDBERG, unlawfully, wilfully, and knowingly, and for the purpose of executing the scheme and artifice to defraud as set forth in paragraphs 19 through 24 hereof, did place and cause to be placed in post offices and authorized depositories for mail matter, and knowingly cause to be delivered by mail according to the direction thereon, mail matter to be sent and delivered by the Postal Service, to wit:

Count	Date	Mail Matter
7	February 13, 1973	Letter from TDA to Continental Stock Transfer Company
8	February 13, 1973	Letter from Davis O'Sullivan Weil & Wolff to Continental Stock Transfer Company
9	February 13, 1973	Letter from Davis O'Sullivan Weil & Wolff to Continental Stock Transfer Company
10	February 21, 1973	Letter from TDA to Continental Stock Transfer Company

(Title 18, United States Code, Sections 1341 and 2.)

COUNT ELEVEN

27. On or about October 4, 1974, in the Southern District of New York, FREDERICK M. FREIDMAN, the defendant, unlawfully, wilfully, and knowingly, by use of the mails and by means and instrumentalities of interstate commerce did solicit proxies from shareholders of TDA common stock by means of a proxy statement containing statements which, at the time and in the light of the circumstances under which said statements were made, were false and misleading with respect to material facts, and which omitted to state material facts necessary in order to make the statements therein not false and misleading.

28. Said defendant did not disclose in said proxy statement the matters set forth in paragraphs 19 through 26 of this Indictment, which paragraphs are hereby repeated and realleged as if fully set forth herein.

(Title 15, United States Code, Sections 78n(a) and 78ff; 17 C.F.R. 240.14a-9; Title 18, United States Code, Section 2.)

COUNT TWELVE

The Grand Jury further charges:

29. On or about March 18, 1975 in the Southern District New York, ERIC BERGE, the defendant, in a matter within the jurisdiction of a department and agency of the United States, to wit, the Securities and Exchange Commission, unlawfully, wilfully, and knowingly did make false, fictitious, and fraudulent statements and representations under oath as hereinafter underlined:

Q. Well, sir, this letter is letter from Mr. Schonbun to you, dated December 18th 1970, is that correct?

A. That's what the date read. I think so.

Q. Do you recall receiving that letter from Mr. Schonbrun?

A. Yes, I do.

MR. PERLMUTTER: I note for the record that the two documents, Division's Exhibits 2 and 3, are unsigned copies of documents.

Q. The original documents that you had received from Mr. Schonbrun, were they signed?

A. They're all signed, to the best of my ability.

Q. Do you recall when you received Division's Exhibit 3? Was that received shortly after December 18, 1970?

A. I cannot tell you exactly the date, but I have to go in, again, on our routine.

Q. I am asking, to the best of your recollection, did you receive this document shortly --

after whatever the date read, yes.

Q. And Division's Exhibit 2, did you receive the November 30th, 1970, letter --

A. The same.

Q. -- shortly after November 30th?

A. Yes, and may I add to that, I really --

Q. And, sir, finally, Division's Exhibit 1, the November 23, 1970, letter, did you receive that shortly after --

A. Yes, sir.

Q. -- November 23, 1970?

A. Yes, sir, yes, sir.

* * * *

Q. Again, I ask you, and you are under oath.

A. Yes, sir.

Q. Do you know if Division's Exhibit 1, the letter dated November 23, 1970, was back-dated?

A. Back-dated?

Q. Yes, when Mr. Schonbrun signed in March of 1971, and back-dated to November 23, 1970?

A. I don't see how, like something like that can be possible, because I must --

Q. Isn't it possible for me right now to write a letter to you and date it January 1, 1970? Sir, that's how it is possible.

A. I, I mean, this would arouse my suspicion. My secretary would arouse it immediately.

Q. Well, sir, do you know if this letter, Division's Exhibit 1, was executed in or about March, 1971?

A. Every letter which I received, whatever the date was, it was executed two or three days later, any letter, period.
I really do not remember the incident of Schonbrun, John Doe, John Smith, whoever name you want to call it, it was only one way of business how we did it.

Q. Sir, we have received information --

A. Yes.

Q. -- that Mr. Schonbrun back-dated this letter to November 23, 1970, and I am asking you, sir --

A. November?

Q. The letter was signed in or about March, 1971, back-dated to November 23, 1970.

A. And you ask me?

Q. Sir, do you recall if you -- first, the first time you ever laid your eyes upon that letter was in or about March of 1971?

A. No, sir. when I ever saw the first time the letter it must have been very close to this date when the letter was dated, but how long it ever takes to arrive to Los Angeles, and maybe if we had a backlog of correspondence and whenever the girl brought the correspondence in, that was, again, our routine.

Q. Did Mr. Fields or Mr. Friedman ever tell you that a letter was going to come from Mr. Schonbrun to you?

A. No, sir.

Q. Did Mr. Fields or Mr. Friedman ever tell you that Mr. Schonbrun was back-dating a letter to you?

A. No, sir.

Q. And Division's Exhibit 2 and Exhibit 3, if I ask the same question as to whether you know whether those letters were also back-dated --

A. No, sir, no, sir, no, sir.

Q. -- you have no knowledge of any back-dating of any letter?

A. No knowledge.

30. The aforesaid sworn testimony of defendant ERIC BERGE, as he then and there well knew, was false, fictitious, and fraudulent in that the letters dated November 23, 1970, November 30, 1970, and December 18, 1970, from Schonbrun [illegible] defendant BERGE, referred to in said testimony, had been [illegible]-dated, and were not received by defendant BERGE on or about the dates of said letters.

(Title 18, United States Code, Section 1001.)

William D. Crouch
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, Jr.
United States Attorney

Clerk
Deputy Clerk

76 CRIM. 1066

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

DOUGLAS P. FIELDS,
FREDERICK M. FRIEDMAN,
PETER S. DAVIS,
ALAN E. SANDBERG, and
ERIC BERGE

INDICTMENT

15 U.S.C. §§ 77q(a), 77x, 78n(a), and 78ff;

18 U.S.C. §§ 371, 1001, 1341, 1343, and 2.

ROBERT B. FISKE, JR.
United States Attorney.

A TRUE BILL

Willie D. Crouch
Foreman.

U.S. DISTRICT COURT
FILED
NOV 8 1976
S. D. OF N. Y.

11-8-76 - Filed Indictment.

JUDGE HAIGHT

11-18-76 - Cooper J.

Deft. Douglas P. Fields (atty: Louis Bender) pleads not guilty. ROR.

Deft. Frederick M. Friedman (atty: Louis Bender) pleads not guilty. ROR.

Deft. Peter S. Davis (atty: Gary Naftalis) pleads not guilty. ROR.

Deft. Alan E. Sandberg (atty: Norman Ostrow) pleads not guilty. ROR.

Deft. Eric Berge (atty: John Tigue) pleads not guilty. ROR.

Assigned Haight, J for all purposes

Cannella J.

Nov. 23, 1976 P.T.C. Deft. Douglas P. Fields and Deft. S.H. Fried[illegible] represented by Att. Louis Bender. Deft. Peter S. Davies by Att. Gary Naftalis. Deft. Alan E. Sandberg by Att. Norman Ostrow. Deft. Eric Berge by Att. John Tigue. Gov't by David Cutner. Motions to be made by January 24th 1977. Tentative date for trial April 18, 1977.
Haight, J

April, 14th 1977 Deft. Eric Berge not present represented by his counsel Atty John Tigue, Gov't by David Cutner A. Deft Berge's application to be severed from the trial, medical reasons is Granted by the Court. Haight, J

APR 18 1977 Deft. Fields and Friedman p/w/Atts Louis Bender and Sandor Frankel. Deft Davis represented by Gary Naftalis, Deft. Sandberg represented by Frank Wright, Deft Berge represented by John Tigue, Gov't by David Cutner, AUSA. Hearing on motion to dismiss indictment.

APR 19 1977 Hearing continues.
APR 20 1977 Hearing continues.
APR 21 1977 Hearing continues.
APR 25 1977 Hearing continues.
APR 26 1977 Hearing continued.
APR 27 1977 Hearing continued.
APR 28 1977 Hearing continues.
MAY 2 - 1977 Hearing continues.
MAY 3 - 1977 Hearing continues.
MAY 4 - 1977 Hearing continues. Hearing Concluded. Exchange finding of fact Not later than May 16, 77 at Noon. Oral argument to be heard on May, 18th 77. Trial date, if any, May 31, 1977 Haight, J.

MAY 23 1977. All Defts p/w/a's as noted above, Gov't by David Cutner and Sandy Gold, AUSA. Oral arguments in support motions to dismiss indictments. Court's decision to be made known on all motions, Wednesday May 25, at 1:30 pm Haight, J

MAY 26 1977 See order of the Court dated May, 25, 1977. Haight, J.

May 26, 1977 Dft Friedman, Davis & Sandberg indictment dismissed by Court order this date. — Haight J

NITED STATES DISTRICT COURT
OUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN, PETER S. DAVIS, ALAN E. SANDBERG and ERIC BERGE, : 76 Cr. 1022-CSH

MEMORANDUM OPINION

Defendants. :

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Appearances:

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Messrs. Grand & Ostrow,
Of Counsel.

JOHN J. TIGUE, ESQ.
80 Pine Street
New York, New York
Attorney for Eric Berge
Messrs. Kostelanetz & Ritholz,
Of Counsel.

HAIGHT, District Judge:

INTRODUCTION

In this memorandum the Court rules upon a number of pre-trial motions put forward by the defendants, some in concert, others individually.

I shall first consider a motion in which all defendants join: to dismiss the indictment on the basis of prior negotiations with Securities and Exchange Commission ("SEC") attorneys, which culminated in the filing of a civil complaint and consent judgments executed by the defendants. Thereafter I shall address the various alternative motions for dismissal or other relief. As a preface, however, the indictment must be summarized.

I.

THE INDICTMENT

Defendants Douglas P. Fields ("Fields"), Frederick M. Friedman ("Friedman") and Alan E. Sandberg ("Sandberg") were officers and/or directors of TDA Industries, Inc. ("TDA"), a publicly-held corporation whose shares were actively traded on the over-the-counter securities market. Defendant Peter S. Davis ("Davis") is an attorney whose law firm was counsel to TDA and defendant Eric Berge ("Berge") was an officer and director of Westcalind Corporation ("Westcalind"), also a publicly-held company whose majority and controlling shareholder was TDA.

In essence, the present indictment charges Fields, Friedman and Davis, in counts one and two, respectively, with conspiring to, and in fact engaging in, illicit schemes and misrepresentations designed to artificially inflate the price of TDA stock prior to a public offering of that company's shares contrary to Section 17 of the Securities Act of 1933, 15 U.S.C. §§77q(a) and (x) ("Section 17"). These manipulations are averred to have involved the defendants, or various combinations of them, in other violations of the substantive law, including contravention of the proxy regulations as set forth in Section 14 of the Securities Exchange Act of 1934, 15 U.S.C. §§78n(a), (ff) ("Section 14") and the rules promulgated thereunder, 17 C.F.R. 240.14a-9 as well as the false statements provision of Title 18, 18 U.S.C. §1001.

More specifically, it is averred with respect to the conspiracy count that Fields, Friedman and Davis agreed to participate in certain fraudulent transactions for the purpose of boosting the price at which TDA stock would sell on the market at about the time of a November, 1971 public offering of some 703,943 shares of TDA, which was being made by certain investors in that company. This maneuver is said to have been made necessary because TDA management had guaranteed these shareholders that their stock, when offered on the open market, would command a guaranteed price per share.

In order to facilitate this scheme, two ploys were utilized. First, it is averred that Fields offered one Thomas Zammas ("Zammas") and other unidentified persons cash payments to induce them to make purchases of TDA stock immediately prior to the public offering. Additionally, the indictment charges these individuals with employing a reciprocal stock purchase agreement whereby Zammas and others would purchase, on the open market, four TDA shares for every one share of Mastercraft Medical and Industrial Corporation (a company controlled by Zammas through his substantial stockholdings therein) similarly purchased by Fields. The object of these activities was allegedly to cause the market price of TDA stock to rise and be maintained at an artificially high and inflated price.

Second, the Government contends that the TDA public offering of November 10, 1971 was accompanied by a prospectus prepared by Fields, Friedman and Davis which was materially false and misleading in that it failed to disclose the following:

(1) A March, 1971 payment of $50,000 by Westcalind, at the insistence of Fields and Friedman, to Bernardi Resources Corporation ("Bernardi"), a private investment company, which was styled a "finder's fee" for efforts in connection with certain corporate acquisitions by Westcalind, when in fact no such services were performed and $35,000 of this fee was remitted to Fields and Friedman. This sham was disguised as a legitimate business transaction through the back-dating of correspondence between one Stanley Schonbrun ("Schonbrun"), Bernardi's attorney, and Berge. Defendants' counsel have denominated this the "Westcalind kick-back";

(2) A device whereby Enterprise Research & Development Co. ("ERD"), a private investment company, was induced in April, 1971 by Fields, Friedman and Davis to sell 90,000 unlettered shares of TDA to Bernardi at approximately $2. per share below the going open market price for such stock, upon an assurance by TDA that

such transfer was a private placement. By prearrangement, however, these shares were immediately registered for public sale, and in fact sold by Bernardi at a substantial profit, 70% of which was kicked back to these defendants. Bernardi's down-payment for the stock was provided by Davis, who in turn had received the money as a loan from White Lamps, Inc., a TDA subsidiary. There is no allegation, however, that this loan was not paid back.

(3) A similarly inspired plan, executed in May, 1971 pursuant to which ERD and a group of fourteen TDA shareholders, possessing in the aggregate 123,178 shares of unlettered TDA stock, were caused to sell to Bernardi their holdings at a price considerably beneath that prevailing for comparable registered TDA stock. Following this transaction, certain TDA officers lifted the restrictions on these shares, which were then sold at a substantial increase in the open market, and 70% of the profits derived therefrom secretly remitted to Fields, Friedman and Davis. The April and May transactions have come to be identified as the "ERD kick-backs".

These machinations, as described in the conspiracy count of the indictment (count one), are averred in count two to be violative of Section 17(a); and as a consequence of filing the November 10, 1971 prospectus with the Securities and Exchange Commission, Fields, Friedman and Davis are charged in count three with having submitted false statements to Government authorities, contrary to 18 U.S.C. §1001.

On December 17 and December 23, 1971, proxies were solicited from TDA and Westcalind shareholders, respectively, concerning various corporate matters including the election of officers and directors. As with the November prospectus, it is averred that the proxy materials failed to disclose the activities described above. By virtue of these omissions, count four of the indictment accuses Fields, Friedman and Davis with having contravened Section 14 and the rules promulgated thereunder with respect to the TDA proxy solicitation; and count five charges these individuals, along with Berge, with a similar violation pursuant to the Westcalind proxy material.

Counts six through eleven relate to an entirely different transaction. The Government alleges that Friedman and Sandberg entered into a scheme, at the time of acquisition by TDA of a company called Eagle Roofing and Art Metal Works, pursuant to which Friedman offered a pay-off to one Stuart Kreisler to accept a sham $100,000 "finder's fee" to be paid by TDA, and to kick-back $70,000 to Sandberg and an additional amount to Friedman. In connection with this kickback scheme, Friedman and Sandberg are charged with substantive violations of the wire fraud statute, 18 U.S.C. §1343 (count six) and mail fraud statute, 18 U.S.C. §1341 (counts seven through ten); and Friedman is charged with proxy act violations in respect of failure to disclose the transaction (count eleven).

Finally, Berge is cited in count twelve of the indictment with having given false statements to the SEC in March, 1975 during that agency's investigation of these dealings. More particularly, the indictment recites that Berge repeatedly testified as to the authenticity of certain correspondence which he knew to have been back-dated so as to disguise the Westcalind kickback as a legitimate "finder's fee".

II.

THE MOTION TO DISMISS THE INDICTMENTS ON THE BASIS OF THE SEC NEGOTIATIONS

As noted, all defendants move to dismiss the indictment on the basis of their prior negotiations with the SEC, culminating in consent judgments which terminated the agency's civil suit against them. It was clear from the motion papers that an evidentiary hearing was necessary to develop the full circumstances. That hearing commenced on April 18, 1977 and was concluded on May 4. The Court heard testimony from two of the defendants, Fields and Davis; their former attorneys; other attorneys representing other defendants; and from representatives of the SEC and the office of the United States Attorney for this district. On the basis of that testimony and related exhibits, the Court makes the following findings.

FINDINGS OF FACT

1. The indictment in this case was filed on November 8, 1976. The charges leveled against the defendants have been summarized *supra*.

2. At the pertinent times, TDA was a New York corporation, whose common stock was registered with the SEC pursuant to the securities laws, and was traded in the over-the-counter market.

3. At the pertinent times, Westcalind was a Delaware corporation, whose common stock was registered with the SEC, and was traded in the over-the-counter market. As of September 8, 1974, TDA controlled a majority of the then issued and outstanding common stock of Westcalind.

4. Defendant Fields had been president of TDA since July 1969, and chairman of the TDA board of directors since May 1970. Fields was president of Westcalind from May 1970 through April 1972, and became chairman of the Westcalind board of directors in May of 1970.

5. Defendant Friedman, a certified public accountant, became financial vice-president, secretary and treasurer of TDA in August of 1970, and became a director of TDA in March 1971. At the pertinent times, Friedman was also the treasurer of Westcalind and a director of that corporation.

6. At the pertinent times, defendant Davis was an attorney and a member of the firm of Davis, O'Sullivan, Weil & Wolff. The Davis firm served as general counsel to TDA from January 1970 to October 1974. Davis was secretary of Westcalind from May 1971 to January 1975, and a director of Westcalind from August 1970 to January 1975.

7. At the pertinent times, defendant Berge was executive vice-president and director of Westcalind.

8. Defendant Sandberg had been vice-president and a director of TDA from October 1966 to May 1970, and a director of Westcalind from September 1970 to March 1972.[1]

9. In 1974 and extending into January of 1975, the office of the District Attorney, New York County, was conducting an investigation into certain activities of Fields, Friedman and Davis. Those activities related to the purchase and resale of TDA stock. The District Attorney's office was also inquiring into certain finder's fee transactions, and was considering the possibility of prosecution under state income tax laws. Fields, Friedman and Davis were represented, during the District Attorney's inquiry, by the firm of Shea, Gould, Climenko and Casey. Milton S. Gould was the partner in charge of the matter, assisted by his partner Saul S. Streit, a former New York Supreme Court justice. During the course of the District Attorney's inquiry, Gould and Streit concluded that TDA required separate representation. Herbert C. Kantor, a member of the firm of Kantor, Shaw and Davidoff, which was general counsel to TDA, undertook that function.

10. On January 9, 1975, Gould and Streit were advised by Assistant District Attorney Driscoll that his office had concluded that the transactions in question were not cognizable offenses under state law.

11. Gould was quite certain that the District Attorney's office would refer the matter to the SEC's New York regional office.

Accordingly he recommended to Fields, Friedman and Davis that it would be preferable for them to bring the matter to the SEC's attention first. Gould regarded such a procedure as highly desirable "if one wanted to avoid a criminal prosecution in this case" under federal securities laws. Gould conferred with Fields, Friedman and Davis on January 10, 1975, and obtained their authority to make certain disclosures to the SEC. On that day Gould telephoned William Moran, regional administrator of the SEC in New York, to ask for an appointment, which was fixed for January 14.

12. Kantor, representing TDA, had agreed with Gould's evaluation, and obtained the approval of the TDA board to cooperate in the disclosures to the SEC.

13. On January 14 a meeting took place at the SEC's New York regional office. Gould and Kantor attended, Gould representing Fields, Friedman and Davis, and Kantor representing TDA. The SEC representatives were: William Moran, the regional administrator; Donald Malawsky, the associate regional administrator; Jeffrey Tucker, a branch chief under Malawsky; William Nortman, an assistant regional administrator; and Stuart Perlmutter, a staff attorney. These SEC representatives had assembled in response to Gould's prior telephone call to Moran, in which Gould said he had disclosures of a serious nature to make. The SEC representatives had no prior knowledge of what Gould was going to say.

14. At the January 14 meeting, Gould and Kantor made the SEC representatives aware of the following transactions, which for the sake of ready reference are keyed to the relevant pages of the indictment:

(1) The transactions in April and May, 1971, pursuant to which ERD was induced to sell 90,000 unlettered shares to Bernardi, who then kicked back 70% of the gross profits on the resale to Fields, Friedman and Davis. [Indictment, Count One, pp. 4-7, ¶¶10(f), (g), (h)].

(2) The Westcalind sham finder's fee and kickback, in March of 1971. [Indictment, Count One, p. 4, ¶10(e)].

(3) The TDA sham finder's fee and kickback, in 1972 and 1973. [Indictment, Count Six, pp. 12-13, ¶¶20-21].

15. At the January 14 meeting, Gould and Kantor did not disclose to the SEC the manipulations of TDA stock in November, 1971 alleged in the indictment at Count One, p. 3, ¶10(a)-(c). Counsel for the defendants said nothing to the SEC about such transactions because the defendants had said nothing on the subject to counsel. This non-disclosure by defendants continued throughout the course of the SEC negotiations. The fact of that non-disclosure is not in dispute, although its consequences are.

16. Gould's objective, in making a voluntary disclosure to the SEC, was to put together a "package", pursuant to which restitution and other civil sanctions might be imposed, but the

SEC would not make a criminal reference of the case to the Department of Justice. In Gould's experience, certain factors were significant "in trying to persuade an agency like the SEC, the enforcement people at the SEC that there should be no criminal prosecution" (Tr. 20); he professed to see such factors in the case at bar. There is a conflict in the testimony as to the specificity with which Gould declared his objective to the SEC representatives. Gould testified that he said:

> "...my objective here is to avoid a criminal prosecution and I think if we can use that as coinage in the case, maybe we could make the stockholders whole, maybe we can get back the money that was taken or whatever profits they make coming to the stockholders. I think that is the way I phrased it. I don't remember what my words were, but certainly I was very frank with Mr. Moran and his people as to why we were doing what we were doing." Tr. 31.

The SEC witnesses deny that Gould or Kantor put forward a proposed package that included an understanding that there be no criminal reference. I need not resolve all aspects of this conflict, which may arise in substantial part from semantics and different shadings of inflection. I do find that, whatever phrases Gould may have used at the initial January 14 meeting or thereafter, Tucker, who was in charge of the SEC's ensuing investigation, was fully aware that defendants' counsel had as one of their two primary objectives the avoidance of a criminal reference, the other primary objective being the retention of Fields and Friedman as officers of TDA. Tucker developed that awareness at the initial January 14 meeting, and it remained in his mind, undiminished, throughout the ensuing events to be related in these Findings.

17. Gould proposed at the January 14 meeting that the SEC investigate the matters disclosed by him, and that, if no further matters of concern were discovered in the inquiry, negotiations take place looking toward a civil settlement. Moran stated that he would first have to obtain approval from the SEC's Division of Enforcement in Washington for the New York office to conduct such an investigation.

18. On February 19, 1975, the SEC approved the Division of Enforcement's recommendation that the New York office be authorized to undertake a formal investigation of the matters disclosed by Gould and Kantor on January 14.

19. On February 28, 1975 a further meeting was held at the SEC's New York office. The participants were Gould; Kantor; Saul S. Streit, a former New York State judge and now a law partner of Gould's; Tucker; and Perlmutter. Gould again made clear to the SEC representatives that one of his primary concerns was to avoid a criminal reference in respect of his individual clients (Fields, Friedman and Davis). Gould also advised Tucker and Perlmutter, at this meeting, that his clients would exercise their Fifth Amendment privilege not to testify during the SEC's investigation. Subsequently, at the SEC's request, Gould confirmed that position in writing; and none of these individuals were actually summoned to testify before the SEC.

20. The SEC inquiry into TDA, its affiliates and principal officers went forward. Kantor, with the approval of the TDA directors, furnished corporate documents. Certain witnesses testified, as will appear infra. Tucker, although reporting to his superiors at the New York regional office, was in operational command of the inquiry. Perlmutter was his top assistant. Various other SEC staff attorneys and investigators were involved.

21. On June 17, 1975, in separate telephone conversations, Tucker advised Gould and Kantor that the SEC investigation was almost concluded; and that it appeared that the January 14 disclosures had been substantially complete and accurate. This advice encouraged defense counsel in their hopes that the matter might be fully resolved through the vehicle of a civil complaint and settlement.

22. While there had been numerous contacts between defense and SEC counsel during the period between February and June, those contacts trailed off after the June 17 conversations referred to in the previous Finding. However, on September 4 the Division of Enforcement in Washington formally authorized the New York office to file a civil complaint and negotiate a settlement. In anticipation of that authority, Tucker had arranged a meeting on September 4 between himself, Perlmutter, Gould and Kantor.

23. At the September 4 meeting, Tucker advised defense counsel of the New York office's authority, and discussed certain

details of what the SEC would demand in its complaint. Specifically, Tucker told Gould that the SEC wanted to obtain broad injunctive relief, disgorgement of any and all monies improperly obtained as a result of defendants' wrongful conduct, removal of Fields and Friedman as directors and officers of the company, installation of a receiver, a restructuring of the board of directors to provide for independent directors, a freeze on the voting of the shares held by Fields and Friedman, and a resignation by Davis of his right to practice before the Commission under Rule of Practice 2(e).

24. Tucker and Perlmutter testified that, at the September 4 meeting, Tucker also said to Gould: "There is no deal on criminal"; and that Gould signified his understanding. Gould and Kantor, while not professing to recall the details of every conversation, were vehement in their testimony that the SEC attorneys never said to them, on September 4 or any other time, that there was "no deal on criminal". It is defendants' contention that, throughout these discussions, SEC counsel remained silent in the face of defense counsel's expressed objective to avoid a criminal reference; and that defense counsel relied on such silence as assent, thus characterizing it to their clients. On the precise point at issue, I do not accept the testimony of Tucker and Perlmutter that such a remark was made at the September 4 meeting. This is the only occasion upon which the SEC attorneys claim to have given an express disclaimer; and yet there were many occasions, both prior and subsequent to September 4, when

such a disclaimer would have been equally, if not more, appropriate. As will appear infra, Gould and his partner Streit based their post-September 4 reports and counselings to defendants on the assumption that the SEC's continued silence on the subject of a criminal reference was an encouraging sign. They would not have steered that course if Gould had received an express disclaimer on September 4, unless Gould was prepared to deceive his partner and his clients, a finding I decline to make. Conscious of the difficulties in resolving credibility issues between witnesses who are all members of the bar, I nevertheless reject the Government's evidence on the precise point at issue. In the view I take of the case, however, this Finding is not of decisive significance.

25. On September 11, 1975, Gould had a telephone conversation with Tucker and Perlmutter, in which they advised him of the specific amount of money the SEC would ask the defendants to pay TDA in the complaint to be filed, and other specific relief the SEC intended to demand. On or about that same date, Gould, Kantor, and Streit reported to Fields, Friedman, and Davis their recent conversations with the SEC attorneys. They advised their clients of the sections of the United States Code under which they would be sued, the amount of money that the SEC would sue for, and the specifics of other ancillary relief the SEC would demand in the complaint. Gould recommended that Fields and Friedman authorize him to negotiate a settlement of the dollar amount to a maximum ceiling of $250,000.00, to be paid by Fields, Friedman and Davis. Fields and Friedman resisted this figure, and also resisted

other aspects of the proposed SEC complaint. Gould stated in response to their resistance that if Fields and Friedman did not authorize him to attempt to settle the case on the terms recommended by Gould, then the SEC would not be bound by the agreement which, in Gould's expressed view, it had made with them not to make a criminal reference. Based upon this statement by Gould, Fields and Friedman authorized Gould to attempt to negotiate a settlement in which the maximum amount to be paid would be $250,000.00, and also authorized Gould to make other concessions regarding the ancillary relief that the SEC intended to seek.

26. On September 16 the SEC filed its civil complaint in this court (75 Civil 4519-LWP). Defendants contend that such filing breached the SEC's agreement, reached in a September 11 telephone conversation between Gould, Tucker and Perlmutter, that filing of the complaint would be deferred until a consent had been negotiated which could then be filed with the complaint. Considerable evidence was adduced on this alleged breach of agreement, which the SEC disputes. I do not find it necessary to resolve the conflict on the point. It is evident that when the complaint was filed on September 16 Gould was angry, and upbraided Perlmutter on the telephone. Perlmutter, upset at the incident, reported it immediately to Moran.

27. Shortly after the filing of the SEC's complaint, Gould became seriously ill and was hospitalized, and his partner Streit assumed the rule of chief counsel for Fields, Friedman and

Davis. On September 30, 1975, a meeting was held at the SEC's New York office. Present were Streit and Tucker, Perlmutter, Kantor, and a Mr. Goldman, one of the SEC's investigators. Tucker stated to Streit that the SEC now insisted on Fields, Friedman, and Davis paying $585,000.00 to TDA as part of the settlement. According to his testimony, Streit responded that it was a "horrendous" amount, and there were serious questions concerning some of the figures, "but in light of the fact that there is to be no criminal prosecution I shall endeavor to obtain the money for you" (Tr.150-153). I accept Streit's testimony that he made a remark of such substance to SEC counsel at the September 30 meeting. It accords with the impression Streit had received as a result of his discussions with Gould. I further find, in accordance with Gould's testimony, that Tucker and Perlmutter remained silent in the face of Streit's comment.

28. Streit reported this meeting to Fields, Friedman and Davis, including the above-quoted statement that had been made by Judge Streit to which the SEC representatives had not responded. For several months thereafter, Fields and Friedman had a series of meetings with Streit, Gould, and Kantor, as did those attorneys with Davis. Fields, Friedman and Davis resisted the terms that the SEC was demanding for settlement of the civil case. However, their resistance was overcome by their attorneys' advice to them that the SEC had agreed that if a satisfactory settlement was made of the civil action, there would be no criminal reference.

29. In October of 1975, Fields met with an attorney named C. Leonard Gordon. Gordon testified that Fields told him of the SEC's investigation and complaint, and stated that a consent judgment had been agreed to in principle. Fields said that among the elements of relief sought in the SEC's complaint, and demanded by the SEC in the settlement negotiations, was a restructuring of TDA's Board of Directors, and that one element of this restructuring was the addition to the Board of a number of outside "independent" directors. Gordon suggested that one of his clients, one John Mosler, would be an appropriate candidate for one of the new directorships. However, Gordon said that Mosler could not consider serving as a director of TDA unless he was assured that there would be no criminal prosecution following entry of the consent judgments. Fields told Gordon that as part of the settlement agreement the SEC had agreed not to make a criminal reference. Gordon then spoke with Kantor, who verified this statement of Fields. In order to be certain, however, Gordon had his law partner, David Butowsky, former chief enforcement attorney at the SEC in Washington, D.C., call Tucker and arrange for a meeting at the SEC at which Gordon and Butowsky met with Perlmutter. Gordon advised Perlmutter that he represented Mosler, and stated to Perlmutter, among other things, that in deciding whether to accept a directorship in TDA it was important for Mosler to know whether there was going to be a criminal reference of the case. Gordon further stated to Perlmutter that Gordon understood there was not going to be a criminal reference. Perlmutter assured

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Gordon that there was not going to be a criminal reference. Gordon thereafter reported Perlmutter's assurance to Mosler and to Fields.

30. On October 20, 1975, Kantor, Streit, and Norman Ostrow (counsel for defendant Sandberg) met at the SEC with Tucker, Perlmutter, and possibly Goldman. Tucker advised defense counsel that the SEC would agree to allowing Fields and Friedman to remain as officers of TDA and Westcalind so long as a senior officer was appointed. After some discussion, agreement was reached on most of the terms of the settlement with Fields, Friedman and Davis, except for the matter of collateral to secure the disgorgement, which was to be made over a period of thirty months.

31. Prior to the October 20 meeting, Ostrow had been told by Gould, Kantor and Judge Streit of the SEC's agreement not to make a criminal reference, and that the SEC's agreement not to make a criminal reference also applied to Sandberg. Ostrow attempted to persuade Tucker and Perlmutter, at the meeting in late October, either not to pursue the complaint against Sandberg or to limit the language of the injunction against Sandberg, who had been named in only one of the finder's fee transactions. When Tucker and Perlmutter indicated they were not persuaded, Ostrow agreed to recommend that Sandberg enter into a settlement, stating that settling would be "better than going over to the golden dome", a reference to the United States Courthouse across the street from and visible from the window of

the SEC's office. Ostrow's reference to "going over to the golden dome" was intended by Ostrow to be a reference to facing a federal indictment. Under the circumstances, it was undoubtedly so understood by Tucker and Perlmutter, who chuckled at the statement but said nothing.

32. Concurrently with these events, the SEC negotiators had been in communication with the United States Attorney's office on the subject of a criminal reference of the TDA matter. In the early fall of 1975, Perlmutter and Tucker discussed referring the case to the United States Attorney, Tucker stating that he would talk about it to Ike Sorkin, a former SEC staff attorney now serving as an Assistant United States Attorney in the Securities Fraud Unit. On September 16, after the civil complaint was filed in circumstances which prompted Gould to upbraid Perlmutter (see Finding of Fact 26 supra), Perlmutter telephoned Sorkin to urge that the United States Attorney's office "investigate the TDA matter." Perlmutter stated that "we really want to get TDA", but advised Sorkin that he first wanted to "wrap up" the civil settlement before the United States Attorney began its own inquiry. Perlmutter made several other calls to Sorkin, of similar import, during October and November, reiterating that the SEC had "a terrific fraud case—the TDA case" which it wanted eventually to send over to the United States Attorney's office. During this stage of the game Sorkin could do no more than express prospective professional interest, since Perlmutter made it plain to Sorkin that the SEC wished to conclude the civil

settlement before the United States Attorney took any action.

33. On December 1, 1975, Gould and Streit met at the SEC with Tucker and Perlmutter. The proposed civil settlement was still being negotiated, with particular reference to the manner in which the defendants' future obligations under the consent judgment were to be collateralized. At the conclusion of the December 1 meeting Gould said to the SEC attorneys: "You've got a great settlement, take it." The defendants' counsel then left. Tucker went directly to the office of Malawsky, his superior, and told him that it looked as if the SEC had a settlement in the TDA case. While Tucker was in Malawsky's office, the latter received a telephone call on an unrelated matter from John Wing, Chief of the Securities Fraud Unit in the United States Attorney's office. Tucker, getting on the telephone, took advantage of the occasion to refer the TDA matter to the United States Attorney for investigation. Tucker followed up that telephone call with a letter to Wing dated December 1, enclosing the SEC's pleadings file on the TDA case and an unrelated matter. The United States Attorney's office declined to proceed on the unrelated matter. In respect of TDA, however, an inquiry was begun, a grand jury presentment made, and the present indictment returned.

34. In making this informal criminal reference to Wing, Tucker followed a practice which had grown up over the past several years. Pertinent statutes and regulations provide for criminal references of matters by the SEC Commissioners

themselves to the Department of Justice for possible prosecution. Various administrative steps accompany this procedure. I find, on the basis of Wing's testimony and that of Stanley Sporkin, Chief of the SEC's Division of Enforcement, that in recent years a more informal method of criminal referral has developed, pursuant to which members of SEC regional offices speak directly to the United States Attorneys' offices, and make them aware of cases for possible prosecution. This informal procedure apparently accounts for the majority of present-day criminal references; Wing, chief of the unit concerned in the office of the United States Attorney for this district, stated that he could not remember a case where a formal criminal reference had been made in the last two years.

35. At the time he made the criminal reference of the TDA case, Tucker knew that avoidance of a criminal reference was one of two primary objectives for Fields and Friedman in the civil settlement negotiations (the other being their retention as corporate officers), and the only objective for Davis, an attorney who was not an officer (see Finding of Fact 16 _supra_). Notwithstanding that knowledge, Tucker at no time disclosed to counsel for these defendants that a criminal reference had in fact been made. That non-disclosure was calculated and deliberate, not inadvertent. Tucker testified that he did not want to do anything that would jeopardize the civil settlement (Tr. 1028-1029); and that, in his view, the defendants:

> "...believed that there would be no criminal case growing out of this and that is why they entered into a consent decree." (Tr. 1091).

36. On December 10, 1975, Fields and Friedman signed consents to a civil judgment which their counsel then forwarded to the SEC. On December 11 Davis signed a consent to judgment. Defendants Sandberg and Berge also signed consents to civil judgments, all of which were forwarded to the SEC, and the contemplated judgments were filed in court. The full terms and sanctions imposed by the consent judgments are set forth in the footnote.[2] Davis also, on December 11, signed a letter constituting a lifetime resignation from practice before the SEC. SEC practice had been Davis' primary activity. Shortly after execution of the consent Davis withdrew from his firm, and has not practiced law to any substantial degree since.

37. I find, on the basis of Gould's testimony, that had he known, subsequent to December 1 but before execution of the consents to judgment, that a criminal reference had in fact been made, he would have recommended to his clients that they not enter into the consents. I further find that such advice would have been accepted, so that the SEC would have lost the civil settlement which Tucker's concealment of the criminal reference was specifically designed to protect. The SEC negotiators testified that, even if disclosure of the criminal reference had been made, the defendants would have had no option but to agree to the civil settlement. I reject that contention on the facts, and also

conclude that, in the circumstances of the case, the SEC is estopped from making it.

38. Defendant Sandberg was represented in the civil settlement negotiations by Ostrow. Ostrow conferred with Gould, Streit and Kantor concerning the substance of the latter's discussions with the SEC; Ostrow also participated in discussions, on Sandberg's behalf, with Tucker and Perlmutter (see Findings of Fact 30 and 31 supra). The SEC did not tell Ostrow that a criminal reference had been made on December 1. As a matter of probabilities, I find that if such disclosure had been made, Ostrow would have advised Sandberg not to agree to the consent judgment, and that Sandberg would have accepted that advice. Sandberg executed his consent on January 6, 1976.

39. Defendant Berge, resident in California, was represented by Kantor in respect of the SEC investigation and the civil settlement. As noted supra, the SEC did not tell Kantor that a criminal reference had been made on December 1. As a matter of probabilities, I find that if such disclosure had been made, Kantor would have advised Berge not to agree to the consent judgment, and that Berge would have accepted that advice. Berge executed his consent on February 10, 1976.

40. On March 18, 1975, Berge waived his Fifth Amendment privilege and testified before the SEC concerning the Westcalind finder's fee kickback (see p. 4 supra). Count twelve of the indictment charges Berge with having given false statements to the SEC in response to those questions. No reference to the alleged

false statements appears in the civil complaint or the consents which terminated the civil litigation.

41. In connection with its inquiry into TDA, the SEC developed some information concerning the alleged manipulations of TDA stock by Fields in November of 1971. As noted in Finding of Fact 15 supra, these transactions were not disclosed by any defendant to defense counsel, and thus were not disclosed by defense counsel to the SEC. At the time of its inquiry the SEC concluded that there was insufficient evidence to support a complaint concerning these transactions. However, following the criminal reference the United States Attorney's office pursued the matter further, and the alleged manipulations are now charged in the indictment, at paragraphs 10(a), (b) and (c). The Government stipulated on oral argument that only Fields is involved in these particular transactions.

CONCLUSIONS OF LAW

Discussion

It is by now well settled that prior conduct of government agents may affect the subsequent course of a criminal case. Thus promises given by prosecutors to induce guilty pleas may, if unfulfilled, require vacatur of the plea,[3] resentencing,[4] or even, where equitable considerations require, an outright release from custody.[5] Equitable relief is available even where the prosecutor's promises were unfulfillable or he lacked personal authority to make them.[6] Other governmental conduct, arising at an earlier stage in the criminal process, may bar prosecution of an indictment.[7]

Defendants' present motions raise the question of whether the Court should intervene as the result of acts of commission and omission on the part of SEC staff attorneys who handled the matter prior to its reference to the United States Attorney. Defendants contend that the SEC representatives breached an agreement, behaved improperly, and the indictment must be dismissed in consequence. The Government denies any agreement or wrong-going on the part of the SEC, challenges the good faith of the defendants, and urges trial of the indictment.

In large part, the Court's evaluation of the effect, if any, of prior governmental acts upon criminal proceedings involves application of common sense standards. Thus in United States v. Minnesota Mining & Mfg. Co., supra n. 7, the court tested for the presence of an alleged government promise that defendant's prior plea would be dispositive of all criminal liability by considering whether:

> "...[T]he totality of the conduct and circumstances, viewed objectively, would lead one in the position of the defendants to reasonably conclude that the guilty pleas and full cooperation would be fully dispositive of all criminal matters arising out of the illegal political contributions." Slip Op. at 7.

This approach has equal validity in resolution of the present defendants' motion to dismiss the indictment. The Court must consider the totality of the conduct of the SEC staff attorneys, the defendants, and their attorneys; weigh the reasonable conclusions that the actors might have drawn from such conduct; hold all parties to a standard of fair dealing; and, within that context, decide whether defendants have just cause for dismissal of the indictment.

I consider first defendants' contention that they had an agreement with the SEC, binding on the Department of Justice, that no criminal reference (and hence no criminal prosecution) would take place.

Surely there was no express agreement, as to any of the present defendants. They may be contrasted with the cases of Kreisler and Weston, two individuals on the periphery of the transactions in question. Their counsel obtained, in consideration of their testimony to the SEC, specific assurances by the SEC attorneys that they would recommend that neither Kreisler nor Weston be named in the civil action *or* in any criminal reference which might arise out of the pertinent transactions.[8] No such express assurance was given to the present defendants; they do not really contend otherwise. The case at bar is, in consequence, distinguishable from *United States v. Rodman*, 519 F.2d 1058 (1st Cir. 1975), upon which defendants rely. In *Rodman* the district court found that "defendant Rodman was induced to give statements to the SEC upon representations that Mr. Riccio [the SEC staff attorney] would make a recommendation that he not be indicted..." 519 F.2d at p. 1059 (material in brackets supplied). No such finding is possible in the instant case with regard to the present defendants. Thus the holding in *Rodman*, dismissing the indictment because the SEC failed to comply with an express agreement, is not apposite here. The same is true of *United States v. Paiva*, 294 F.Supp. 742 (D.D.C. 1969), in which the court found (and enforced) an express agreement by the United States Attorney not to prosecute the defendant if he cooperated. *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), which the present defendants also stress, contains broad language, but its holding is limited to a direction that the district court hold an evidentiary hearing to determine "if a promise was made and, if so, by whom and of what scope." 454 F.2d at p. 427 (defendant argued that an assistant United States Attorney had promised freedom from prosecution in exchange for cooperation). In the case at bar, the evidentiary hearing has been held.

Defendants argue, however, that the absence of an express agreement is not fatal to their contract theory. It is said that the SEC's silence, in the face of defense counsel's known desire to avoid a criminal reference, constitutes an acceptance of the proposed package. Defendants point to an indication in a footnote in *Carter*, *supra*, that the alleged agreement with the prosecutor was based only on defense counsel's "understanding". 454 F.2d at p. 427 n. 1. Defendants also cite a number of cases involving contracts between private parties, where in certain circumstances silence was held to constitute assent.

I have found that the SEC staff members did not respond specifically to the objective of defense counsel, expressed or understood, that there be no criminal reference. However, it does not follow that such silence, *without more*, gives rise to a binding assent which bars subsequent prosecution. In order that the Court's basis of decision be properly identified, I shall enlarge upon that point.

Silence does not always constitute assent. As the authorities relied upon by defendants stress, there is a duty to speak only "under circumstances which reasonably called for a reply", *Hellenic Lines Ltd. v. Gulf Oil Corp.*, 340 F.2d 398, 401 (2d Cir. 1965); and the offeror, seeking to enforce an unspoken bargain, may do so only in circumstances where he "reasonably and in good faith" places such a construction upon the silence of the offeree. 1 Williston, Contracts, ¶¶90, 91A (3d Ed. 1957). It is necessary, therefore, to consider the context of these negotiations with the SEC; and to determine whether defense counsel's professed reliance upon the SEC's silence, on the point of criminal reference, may be regarded as reasonable.

The question is not free from difficulty; and the difficulty is inherent in the relationship of the parties, where both civil and criminal inquiries may arise from the same transactions. This is the sort of situation which has led to prior expressions of judicial concern. In United States v. Parrott, 248 F.Supp. 196, 201 (D.D.C. 1965), the court expressed the general view "that parallel civil and criminal inquiries should not be commingled." In United States v. Parrott, 425 F.2d 972 (2d Cir.), cert. den., 400 U.S. 824 (1970), relied upon by the Government in the case at bar, the Second Circuit, although upholding a conviction for securities violations following an SEC inquiry, noted that "the claim that pressing the civil proceedings while allegedly concealing the intent to prosecute criminally was unfair has considerable appeal." 425 F.2d at 976. However, on the question of silence, pure and simple, uncomplicated by any element of concealment, I conclude that defendants' reliance must be characterized as unreasonable.

Experienced defense counsel are, perforce, aware that in cases of this nature, "more than civil proceedings might be contemplated", United States v. Parrott, supra, at 425 F.2d at 976. In these circumstances, if they wish to condition their clients' participation or cooperation in a civil proceeding, conducted by the SEC, upon an agreement by the SEC not to make a criminal reference, it is the obligation of counsel to make that specific request, and then be guided by the SEC's response to it. That is precisely the procedure followed by counsel for Messrs. Kreisler and Weston in this very case. In the Court's opinion, the burden of requesting and obtaining an express agreement from the SEC, in cases of this nature, falls reasonably upon the shoulders of defense counsel; and it follows that defense counsel cannot reasonably equate silence on the part of the SEC with assent.

I am mindful of Mr. Gould's testimony that, on the basis of his formidable experience in dealings with the SEC, he was entitled to construe silence as assent in the case at bar. But the specific cases to which he referred in his testimony did not withstand the analysis furnished by the Government's further explication of those cases. Furthermore, a holding that SEC staff attorneys, by silence alone, may place the Government in a position where no subsequent criminal charge can be made, has enormous potential for mischief. Courts would be called upon to decide just what it was that defendants or their counsel said during the course of a civil inquiry; if the SEC attorneys had actually heard or appreciated what was being said or intimated; and what, if anything, the SEC representatives said in response. SEC staff members should not bear the responsibility of constantly proclaiming that no agreement on a criminal reference is to be implied, at the risk of foreclosing subsequent criminal charges. A holding imposing such a duty would open a Pandora's box of potential litigation.

In the case at bar, however, more is presented than SEC silence in the face of defendants' expressed desire to avoid a criminal reference. I have found that on two separate occasions, the SEC representatives maintained that silence when individuals clearly indicated their understanding that an agreement not to make a criminal reference had actually been achieved. Those incidents involve Streit's discussion with Tucker and Perlmutter on September 30, 1975 (see Finding of Fact 27 supra), and Ostrow's discussion with Tucker and Perlmutter on October 20 (see Finding of Fact 31 supra). Furthermore, in October of 1975 Perlmutter had assured attorney Gordon, in response to the latter's request for information on behalf of a prospective new director, that there would be no criminal reference (see Finding of Fact 29 supra). Finally, the SEC actually made a criminal reference, during the course of the civil settlement negotiations, and prior to consummation of that settlement, and did not disclose the fact of the criminal reference to defendants or their counsel, although the SEC representatives knew that a primary objective of the defendants in the negotiations was the avoidance of a criminal reference, and that knowledge that a criminal reference had been made would be of material significance to the defendants (see Findings of Fact 16, 35).

Quite obviously, these facts give an additional dimension to the case. We are no longer concerned with defense counsel expressing a desire to avoid a criminal reference, and the SEC representatives failing to respond specifically to that expressed desire. The two incidents of silence just referred to (Streit conversation and Ostrow conversation) are of a different kind, for the SEC representatives were on notice, from what was being said to them, that the speakers were under the impression (reasonable or not, justified or not), that an agreement not to make a criminal reference had been achieved. As for Perlmutter's assurance to attorney Gordon (who was not directly involved in the case, and whose evidence I have no hesitation in accepting), an additional element appears: here, the SEC representative affirmatively indicated that there would be no criminal reference. And the final element presents the question of whether the SEC, in the circumstances of this case, was under a duty to disclose the fact that a criminal reference had in fact been made.

Before turning to these additional elements, I consider the defendants' threshold argument on the making of the criminal reference, namely, that the manner in which the case was referred to the United States Attorney contravened the pertinent statute, regulations, and SEC procedures. In essence, defendants argue that since the statute, 15 U.S.C. §§77t(b), 78(u)(b) and the regulations, 17 C.F.R. §202.5(b), provide that "the Commission" may refer matters to the Department of Justice for possible prosecution, it is only the Commissioners themselves who have such authority.

In the case at bar, it is undisputed that the criminal reference took the form of an informal advice from Tucker of the SEC to Wing of the United States Attorney's office. This informal procedure has grown up over the past several years, so that it now represents the manner in which most criminal references are made, at least in this district. I am asked to declare this informal procedure illegal, and dismiss the indictment on that ground alone.

I decline to invalidate the working relationship which has grown up between the SEC regional offices and the offices of United States Attorneys in recent years. As explained in the evidence of Mr. Sporkin, the Chief of the SEC Division of Enforcement, the informal procedure is time-saving and the result of various practical considerations. Nothing in the statute or regulations expressly prohibits any method of criminal reference other than a reference by the Commissioners themselves; accordingly prohibition must be found, if at all, by necessary implication. But I conclude that the SEC may, without violating its governing statutes or its own regulations and procedures, sanction this method of informal criminal references. There are sufficient due process safeguards in the grand jury machinery itself, and defendants such as those involved in the present case are not legally entitled to insist that the SEC restrict itself to one particular procedure, even though that procedure, if followed, might have given defendants opportunities to urge, at an administrative level, that no criminal reference be made. Compare SEC v. National Student Marketing Corp., 538 F.2d 404, 407 (D.C.Cir. 1976), cert. den., ___ U.S. ___ (1977).

We come, then, to the question of the propriety of the SEC's actions in this case, and the consequence of any impropriety. The Court's holding is limited to the particular circumstances of the case, as revealed by the evidence.

I am constrained to hold that Messrs. Tucker and Perlmutter of the SEC New York regional office behaved improperly in this case. Silence in the face of Streit's and Ostrow's expressed belief that an agreement in respect of a criminal reference had been reached was misleading, and in the circumstances wrongful. *A fortiori*, Perlmutter's assurance to Gordon, that no criminal reference would be made, was misleading and wrongful. This pattern of behavior is particularly deplorable in view of the fact that the SEC representatives had quite clearly determined to make a criminal reference as soon as the civil settlement was "wrapped up"; that concealed purpose furnishes the motive for misleading counsel, but hardly serves to excuse the behavior.

The SEC's strategy of concealment led logically to nondisclosure of the fact that, on December 1, a criminal reference had actually been made. In the circumstances of the case, I conclude that principles of equity and fairness required the SEC representatives to advise defense counsel immediately that a criminal reference had been made. In reaching that conclusion, I am assisted by the testimony of Mr. Sporkin, who responded to a hypothetical question put by the Court which recreated the state of facts as of December 1 in the case at bar, and inquired as to whether the SEC staff members were obligated to disclose the fact of the criminal reference to defense counsel. Mr. Sporkin testified:

> "On my own personal view, knowing all the facts you were saying, and this is the way I live my life and as a fairness matter, strictly in terms of fairness, I certainly would have—I don't know whether I would have told them that the matter is over in the courthouse now, but I certainly would have said to him—because I might not be permitted to tell him—but I certainly would have said to him discount 100 per cent any thought in your mind that this will settle a possible criminal action. Take that as zero in your determination. If you still then want to go through with the settlement, that is up to you, but it clearly goes only to the question of the negotiation of the civil aspects of the case." Tr. 768-769.

In his following testimony, Mr. Sporkin made it clear that he would, in such circumstances, tell defense counsel specifically "that the matter is over in the courthouse now", unless there were particular circumstances militating against such specific advice. I perceive no such circumstances in the case at bar; but even if they existed, Mr. Sporkin's testimony makes it clear that, "in terms of fairness", a very strong signal should have been sent to defense counsel as soon as the criminal reference had been made.

I am grateful to Mr. Sporkin for the candor with which he responded to that question; and I share his view of what constitutes fair dealing in such circumstances. I fully recognize that, in Mr. Sporkin's further view, the appropriate remedy for defendants in such a position is to reopen the civil consent judgments, and that the criminal indictment should not be adversely affected. On that question of appropriate remedy, I cannot agree with Mr. Sporkin, for reasons set forth *infra*.

I conclude, in sum, that the SEC representatives in question engaged upon a deliberate course of concealment, first of their intention to make a criminal reference, and then of the fact that the reference had been made, in order to obtain civil consent judgments imposing substantial sanctions upon the defendants.[9] A primary objective of Fields and Friedman, and the sole objective of the other defendants, in agreeing to such sanctions was the avoidance of a criminal reference, as the SEC representatives well knew. In these circumstances, the conduct of the SEC representatives cannot be condoned. It is a sad irony that representatives of a governmental agency dedicated to the prevention of fraudulent and misleading statements fell into this particular pattern of behavior.

I do not hold that SEC negotiators are obligated, in all circumstances, to keep defense counsel *au courant* as to their tentative or preliminary thoughts on a *future* criminal reference; or that equally preliminary conversations between the SEC and a United States Attorney must be promptly revealed. What I do hold is that, in the circumstances of this case, the SEC's nondisclosure of the *present fact* of a criminal reference, viewed in the context of all that had gone before, was inequitable and wrong.[10]

The wrongfulness of the SEC's behavior having been demonstrated, the question of appropriate remedy, if any, arises. There are three initial alternatives:

(1) An admonishment to the SEC, intended to prevent future occurrences, but unaccompanied by any sanction.

(2) Permitting the defendants to reopen the consent judgments entered in the civil suit, but taking no action with respect to the indictment. That is the course urged upon the Court by the Government, in the event that impropriety is found.

(3) Dismissing the indictment in its entirety. That is the course urged upon the Court by the defendants, who seek to embrace the confines of the remedy to include transactions not referred to in the civil complaint or settlement.

A perception of governmental impropriety vests the courts with discretion in prescribing the appropriate remedy. Santobello v. New York, 404 U.S. 257, 262-263 (1971). The source of that discretion is the supervisory power in criminal cases which may be exercised by the Supreme Court, McNabb v. United States, 318 U.S. 332, 340 (1943); or in appropriate cases by the Courts of Appeals, United States v. Jacobs, 547 F.2d 772, 776 (2d Cir. 1976), or, where necessary and appropriate, by the district courts, United States v. Paiva, 294 F.Supp. 742, 746 (D.D.C. 1969). Mr. Justice Frankfurter, concurring in Sherman v. United States, 356 U.S. 369, 380 (1958) stated the general principle:

> "Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their

> face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts,' McNabb v. United States, 318 U.S. 332, 341, an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."

I conclude without difficulty that a simple admonishment, unaccompanied by any sanction, is inappropriate. One purpose of a sanction in such circumstances is to discourage comparable governmental activity in the future; the Second Circuit in United States v. Jacobs, supra, characterized this as a "didactic purpose", 547 F.2d at 778; compare United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972).

Nor can I agree with the Government that a reopening of the civil consent judgments constitutes a sufficient remedy. The guiding principles are those of equity. If the consent judgments are vacated, and all civil sanctions removed, TDA shareholders will be required to restore to these particular defendants monies which the defendants were obliged, by the civil settlement, to disgorge. That is not, in the circumstances of the case, an appealing resolution. Furthermore, it is impossible, by reopening the civil consent judgments, to restore the individuals concerned to the positions in which they found themselves at the time of the nondisclosure of the criminal reference, in December of 1975, and the subsequent execution of the consent judgments. That is particularly true in the case of defendant

Davis, who as noted resigned from his law partnership and saw his practice come to a virtual end, as the direct consequence of the SEC's bargained-for withdrawal of Davis from practice before the Commission. The same situation arises, albeit with lesser dramatic force, in respect of the activities which the other defendants were obliged to give up as a result of the consent judgments. I conclude that reopening of the civil suit is not a sufficient remedy.

I also reject the remedy put forward by the defendants, namely, dismissal of all charges and counts of the indictment. Again, returning to the touchstone of equity, I perceive no basis upon which transactions not revealed by the defendants to the SEC, and consequently not referred to in the civil litigation or its subsequent settlement, are foreclosed from criminal prosecution in the circumstances of this case. It is true, as defendant Fields points out, that in the course of its own inquiry the SEC developed some information about the November, 1971 stock manipulations of which Fields stands accused by the indictment. The SEC apparently did not develop sufficient information concerning those transactions to include them in its civil complaint; but the grand jury developed sufficient information during its own inquiry to vote an indictment. Fields, who appeals in large part to the doctrine of equitable estoppel is in no position to make such an argument with respect to transactions which he did not reveal to the SEC.

Similarly, there is no basis upon which defendant Berge can appeal to equity, in order to bar prosecution of count twelve of the indictment, which charges him with making false statements to the SEC during its inquiry. It is true, as Berge points out, that the SEC, in evaluating that aspect of the case concerning which Berge testified, apparently did not accept Berge's testimony as accurate. But it hardly follows that the Government is barred, by its settlement of a civil action dealing with entirely separate issues, from prosecuting a charge of false statements during the course of its inquiry. Berge contends that his statements were not in fact false. That is an issue for the trial jury to determine.

The Court concludes that, in the circumstances of the case, the proper remedy is to strike from the indictment all reference to transactions which were disclosed to the SEC, and were referred to in the civil suit and its subsequent settlement. I fully recognize that any court "finds itself in a veritable dilemma when its choice is between vindicating a rule by sanction and allowing a possibly guilty person to escape." United States v. Jacobs, supra, at 775. However, I am in accord with the observation of Mr. Justice Holmes, dissenting in Olmstead v. United States, 277 U.S. 438, 470 (1928):

> "For my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

In the case at bar, the regrettable fact is that the Government, acting through representatives of the SEC, played "an ignoble part"; and I have concluded, not without reluctance, that indicated charges of the indictment must be dismissed in consequence.

The Government argues that a showing of prejudice in the criminal proceeding is a condition precedent to the contemplated remedy. But the supervisory powers of the courts do not require, as a condition to their exercise, that the defendant have suffered some specific damage in the preparation of his defense. A showing that the administration of justice itself has been prejudiced, by inequitable behavior, is sufficient to invoke those supervisory powers.

Illustrative of the point is In the Matter of Doe, 410 F.Supp. 1163 (E.D.Mich. 1976), wherein defendant offered to surrender a quantity of cocaine to federal authorities in return for a guarantee that he would not be interrogated concerning its source or the circumstances under which he procured it. After having acceded to the defendant's terms, the Government called him as a grand jury witness, and caused an order of immunity to be conferred upon him. Defendant's motion to vacate that order was granted:

> "...[J]udicial integrity and the 'interests of justice'...would be offended if the court ratified the government's broken promise to Doe by reaffirming the immunity order...
>
> "Neither may the government insist that Doe demonsrate some prejudice before claiming a violation of his rights in the government's broken promise. No prejudice, apart from that suffered by the administration of justice was apparent in Santobello." 410 F.Supp. at 1166.

In *United States v. Rodman*, *supra*, it is apparent from analysis of the proceedings before the district court that the Government consented to the suppression of any evidence obtained by the prosecutor from Rodman as the result of his agreement with the SEC, thereby eliminating any element of prejudice in defense of the criminal charge. However, the district court concluded that, in the circumstances of the case, the indictment must nonetheless be dismissed.

I recognize that, in *Doe* and *Rodman*, specific agreements on the part of government agents were found. Although no such finding is made in the case at bar, *Doe* and *Rodman* nevertheless illustrate the proposition that indictments are subject to dismissal, in an appropriate case, even in the absence of specific prejudice to the criminal accused.

In defending the actions of the SEC, and arguing that they should have no effect upon the indictment, the Government relies primarily upon three decisions of the Second Circuit: *United States v. Parrott*, 425 F.2d 972 (2d Cir. 1970); *United States v. Light*, 394 F.2d 908 (2d Cir. 1968); and *United States v. Rubinson*, 543 F.2d 951 (2d Cir. 1976). These cases are of no particular assistance in the resolution of the case at bar, primarily because the governmental acts reflected by those cases bear no meaningful resemblance to the pattern of behavior which emerges from the present record.

Thus in *Parrott*, a prosecution for violation of securities laws, the SEC had conducted a prior civil proceeding in which the defendants had testified. The defendants then contended that "pressing the civil proceedings while allegedly concealing the intent to prosecute criminally was unfair", 425 F.2d at 976. As noted supra, the Second Circuit viewed this argument as one having "considerable appeal". However, the argument was rejected on the facts of the case, since the only unfair consequence of which defendants complained was the development of information during the civil proceeding. The Second Circuit pointed out that, in respect of such information, "the Parrotts could have exercised their privilege against self-incrimination in the civil proceedings"; furthermore, as the Court pointed out, that prior testimony in the civil proceedings "was not used by the government in its case in chief or in cross-examination of Forrest Parrott, the sole defense witness." 425 F.2d at 976. Unlike the case at bar, there was no evidence in Parrott of a negotiated civil settlement, or circumstances which rendered non-disclosure of the making of a criminal reference unfair. There is, in short, considerably more appeal to the argument of unfairness in the case at bar than could be suggested in Parrott.

Light also involved a prosecution for violation of the securities laws. Defendants, having been convicted, contended on appeal that the trial court should have suppressed certain books and records obtained by the SEC during a civil injunction proceeding, and later turned over to the United States Attorney's office. The defendants had consented to the removal and examination of the books; they argued that by turning the records over to the United States Attorney, the SEC exceeded the consent given. Rejecting the contention, the Second Circuit stated:

> "...Once records have been voluntarily turned over to a government agent, the government is not guilty of fraud or deceit in failing to apprise the subject of a change in the character of the investigation, for he is made aware of the risks attendant upon a voluntary disclosure by the warning inherent in the request." 394 F.2d at 914.

Again, the negotiation of a civil settlement, and the attendant circumstances which required disclosure of the making of a criminal reference, are not present in Light. The Second Circuit in Light, observing that the defendants in that case were fully aware of risks inherent in a voluntary disclosure of documents, found that the Government was "not guilty of fraud or deceit in failing to apprise the subject of a change in the character of the investigation..." The Government, in its brief (p. 37), seeks to expand that holding into a ruling "that the SEC is not obligated to apprise defendants of a criminal reference" in any circumstances. I do not give so broad a reading to Light. Each case turns on its own circumstances; indeed, the Court in Light was careful to condition its holding upon "the absence of a showing that [the documents] were obtained through fraud and deceit in the first instance", 394 F.2d at 914, a statement which recognizes by implication that fraud and deceit may be shown in other circumstances, with possibly different consequences.

Rubinson follows Parrott in holding that a contention based upon unfairness, but limited to a claim that information was developed during the course of a prior civil proceeding, is legally insufficient, in view of the availability of the Fifth

Amendment privilege in the civil proceeding. In Rubinson, the Second Circuit quoted the observation in United States v. Kordel, 397 U.S. 1, 11 (1970), that a governmental agency need not invariably "choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or defer civil proceedings pending [illegible] ultimate outcome of the criminal trial." In the case at bar, the Court imposes no such choice. All that is required by the Court's holding is that a governmental agency refrain from concealing its recommendation of criminal prosecution, when within the context of its effort to obtain civil relief such concealment is unfair.

In surveying the recent decisions of the Second Circuit, I find more guidance in United States v. Jacobs, supra. In Jacobs, a special government attorney who was a member of the Strike Force, 28 U.S.C. §543, presented a case to a grand jury. The attorney departed from the well-recognized practice of United States Attorneys in the Circuit by failing to warn the defendant that he was a target of the investigation. Because of that failure, the Second Circuit, in the exercise of its supervisory powers, dismissed count two of the indictment, which charged the commission of perjury before the grand jury. The Court of Appeals took comfort, in Jacobs, from the fact that the substantive crime charged in the indictment was not subject to dismissal. In the case at bar, the dismissals which I am ordering work a more drastic effect upon the indictment, and so that particular sense of comfort is diminished; however, the impropriety of the SEC representatives in the case at bar clearly rises to a higher level than that demonstrated by the inadvertent omission of the Strike Force prosecutor in Jacobs.

The Government also points out that many cases dismissing indictments on the basis of governmental misbehavior arise out of misconduct of prosecutors. In the case at bar, I find no fault with the actions of any member of the office of the United States Attorney for this district. The impropriety that I have found is confined to representatives of the SEC. But consideration of improper and inequitable behavior is not limited to the confines of the prosecutor's office. It is Government, in all its offices and functions, which must be held to standards of fair and honest dealing with the citizens of the Republic. It is well settled that conduct of members of Government agencies other than the Department of Justice, or a United States Attorney's office may operate to bar subsequent criminal prosecution. United States v. Rodman, supra (SEC representatives); United States v. Orman, 417 F.Supp. 1126 (D.Col. 1976) (misconduct of federal drug enforcement agents); compare United States v. Tweel, reported in P-H Fed. Inc. Taxes, 39 AFTR2d 77-1223, decided April 8, 1977 (5th Cir.), and United States v. Payner, case No. CR76-305 (N.D.Ohio, E.D.), opinion filed April 28, 1977, in which the courts suppressed evidence obtained as the result of misconduct of IRS agents.

In the light of the facts as found, and in the exercise of the Court's supervisory powers, I exercise my discretion and strike from the indictment those charges and allegations referred to in the civil litigation.

II.

ALTERNATIVE GROUNDS FOR DISMISSAL

The foregoing discussion is sufficient to dispose of all allegations in the indictment which mirror disclosures made by the defendants to the SEC, and are consequently reflected in the civil suit and settlement.

Quite apart from this basis for decision, there are alternative and compelling legal reasons why certain aspects of the indictment must be dismissed. These aspects relate to the ERD transactions, as to which the indictment states no offense under pertinent authority. These contentions were also raised in the defendants' motion papers. In order that the case be fully stated for the possible consideration of higher authority, I shall state the reasoning which underlies these alternative conclusions.

A. The Materiality of the ERD Transactions to the Public Offering

Defendants' counsel move to dismiss the portions of the indictment relating to the public offering (i.e., counts one, two and three) for failure to state an offense in that the means allegedly employed to implement this fraudulent scheme were, in their view, unrelated to the "offer or sale" of the securities at the November 10, 1971 public offering, as required by Section 17. Basically, it is contended that neither Zammas' activities nor the deficient prospectus caused any investor to be defrauded in the purchase of TDA stock. As Fields' and Friedman's counsel succinctly state, the public offering counts lack "...a causal connection between the fraud charged and the actual sale of the security..." In essence, defendants urge that these devices were simply not material to the public offering because they did not bear on the actual financial health of TDA, and consequently their commission (in the case of the Zammas manipulation) or omission from the prospectus (in the case of the Westcalind and ERD kickbacks) could not have caused the damage suffered by individuals investing in TDA through the public offering.

As noted infra at p. 56, notions of materiality and causation developed in the civil context are fully applicable to criminal prosecution of securities act violations. What is lacking in the public offering counts, defendants argue, is "transaction causation", see Schlick v. Penn Dixie Cement Corp., 507 F.2d 374, 380-81 (2d Cir. 1974), cert. den., 421 U.S. 976 (1975), since the averred omissions, being immaterial to the true status of TDA, could not have induced the purchase of its stock.

With respect to the maneuverings of Zammas, this claim is plainly without merit. Both his reciprocal purchases and spot acquisitions of TDA are "classical" methods of artifically stimulating the demand for a given stock and thereby bolstering its market price, United States v. Corr, 543 F.2d 1042, 1045-47 (2d Cir. 1976); United States v. Koss, 506 F.2d 1103, 1108 (2d Cir. 1974), cert. den., 421 U.S. 911 (1975). As such, these manipulations would clearly operate as a fraud upon investors and consequently, the motion in this regard is denied.

A finer analysis is needed with respect to the role the deficient prospectus is averred to have played in the TDA public offering. Defendants argue, somewhat opaquely, that the activities deliberately omitted from the prospectus—namely the illicit Westcalind commission and the April and May, 1971 ERD kickbacks—could not have had, and did not in actuality have, any effect upon the fairness or legitimacy of the TDA stock purchases. This apparently follows from the fact that those transactions, reprehensible though they may be, did not impact on the issuing company's financial condition such that innocent purchasers were lured into investing in a corporation whose true condition had been materially misrepresented to them. Since the effect of those manipulations was not to waste corporate assets or deplete its treasury, the purity of the actual market transactions in TDA were not sullied. In short, defendants' averred omissions did not bear on the economic well being of the company such that their nondisclosure led unwary purchasers to buy into a company which had in reality been damaged by those peculations.

In theory, this point is well taken. It is inapplicable, however, to the Westcalind "finder's fee" since the $50,000 commission involved there was paid by the corporation, and represents precisely the kind of self-dealing which debilitates the corporation and thereby misleads purchasers of that company's stock who were unaware of it, e.g., United States v. Aloi, 511 F.2d 585 (2d Cir. 1975). Consequently, the motion in this respect must be denied.

The converse situation is presented by the ERD transactions, and a likewise opposite conclusion is reached. It is true that these schemes, if proven, would constitute blatant instances of the kind of over-reaching condemned by our securities laws. As pleaded, however, these transactions did not in any discernible way bear upon the financial condition of the company whose shares were being publicly marketed. That is, defendants' ill-gotten gains had not been at the expense of TDA, and consequently the failure to disclose such manipulations was not relevant to a purchaser's informed decision on the merits of investing in the company. Neither the indictment nor the Government's memorandum of law contain any indication of how the ERD transactions could have reflected upon the company's true financial status, nor is any effect implicit from the nature of those dealings. The indictment does state in paragraph 10(f)(iv) that the money used by Bernardi as a down payment on the TDA stock purchased from ERD in April, 1971 was obtained as a loan from White Lamps, Inc., a TDA subsidiary. However, there is no indication that this obligation was not repaid, and consequently, there appears to have been no raiding of TDA's treasury in order to facilitate the ERD transactions.

At most, the nondisclosures of the ERD schemes deprived investors of the knowledge that certain TDA directors and officers had larceny in their hearts. However, Section 17 cannot be read so broadly as to require the inclusion of character profiles of key personnel in each prospectus. Defendants' counsel adduce many learned cases indicating that such revelation is beyond the limited scope, purpose and mission of Section 17; no discussion of such authority is necessary here since to state the proposition is to recognize its invalidity.

To be sure, the ERD schemes had their victims, to wit, ERD itself and the unidentified group of seed shareholders who were induced to sell their unregistered TDA shares without the knowledge that its restrictions would be lifted immediately thereafter. As defrauded sellers of securities, those shareholders are unfortunately not within the purview of Section 17. This is the dilemma which pervades the public offering counts of the indictment; the illegality charged is basically a Section 10(b) violation in that the injured parties were the deceived sellers of TDA stock. A prosecution for violation of that provision would appear to be barred by the statute of limitations, and consequently, the Government has attempted to resuscitate the ERD schemes by portraying them as acts in furtherance of a conspiracy. For the reasons just stated that approach is inappropriate, and the motion to dismiss the public offering counts for failure to state an offense is granted to the extent that the ERD transactions, portrayed in paragraphs 10(f) and 10(g), are stricken. Accordingly, no evidence concerning those activities will be admitted into evidence in support of the charge that the prospectus was materially deficient. See United States v. Wolfson, 437 F.2d 862 (2d Cir. 1970).

B. The Materiality of the ERD Transactions to the Proxy Solicitations

Defendants named in counts 4 and 5 of the indictment, charging violations of the proxy section of the Exchange Act, 15 U.S.C. §78(n), and a rule promulgated thereunder, 17 C.F.R. 240.14a-9, move for dismissal of those charges on a theory similar to that with which they attacked the legal sufficiency of the public offering counts.

Count 4, which names Fields, Friedman and Davis as defendants, relates to a solicitation of proxies from TDA shareholders. Count 5, which names Fields, Friedman, Davis and Berge as defendants, relates to a solicitation from Westcalind shareholders. Both solicitations took place in December of 1971. Violation is said to lie in omission from the proxy statements of the several matters alleged in count 1 of the indictment.

The TDA solicitation of proxies related to the annual meeting of shareholders of that company, to be held on January 25, 1972. Two specific items of business were referred to: a proposal to amend the company's stock option plan, and the election of three directors.

The Westcalind proxy solicitation referred to the annual meeting of January 31, 1972. The only specific order of business covered by the solicitation was the election of six directors.

The defendants concerned first attack these counts on the ground that Section 14(a) applies only to proxy solicitations in respect of "registered" securities, and there is no allegation in either count that TDA's common stock was registered. It is correct that this element is not alleged with specificity in the counts under consideration; but I agree with the Government that the reference to the TDA common stock, alleged in other counts of the indictment to have been offered to the public for sale, supplies the element of registration to the counts in question by necessary implication. 15 U.S.C. §781(g); cf. United States v. Silverman, 430 F.2d 106, 109-12 (2d Cir. 1970).

As a second line of attack, the defendants contend that the alleged omissions were not alleged to be material to the proxy statements, and that the omissions are, in fact, immaterial.

I am not prepared to dismiss these counts of the indictment on the ground of a failure to set forth the proxy statements in detail, or to allege with specificity the manner in which the omitted statements may have been material to shareholders. But the defendants' contention of non-materiality may appropriately be considered, prior to trial, within the context of a motion to dismiss. That is to say, if it is apparent that at the conclusion of the Government's case the defendants would be entitled to dismissal of these counts as a matter of law, the nettle might as well be grasped at this time.

For this reason, the Court has familiarized itself with the contents of the proxy statements, as summarized above. I conclude that count 4, relating to the TDA proxy solicitation, is subject to dismissal on this alternative ground, but that count 5, relating to the Westcalind proxy solicitation, is not.

Count 4 must be dismissed because there is no causal connection between either of the acts scheduled for the TDA stockholders' meeting (amendment of the stock option plan and election of directors) and the various acts and transactions alleged in count 1 of the indictment.

In considering the necessary elements of a Section 14(a) violation, we may look for instruction to civil cases invoking the statute. The elements of the violation are the same; the only practical difference is that in a civil case the violation must be established by a preponderance of the evidence, whereas in a criminal case the Government must "meet the stricter requirement of satisfying the jury beyond reasonable doubt." *Securities and Exchange Commission v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943); and see *United States v. Charnay*, 537 F.2d 341, 348 (9th Cir. 1976), *cert. den.*, ___U.S.___ (1977) (45 U.S.L.W. 3416), and *United States v. Clark*, 359 F.Supp. 128, 130 (S.D.N.Y. 1973).

It is well settled, by the civil cases, that there must be a causal connection between the non-disclosures in the proxy solicitation and the transaction accomplished or implemented by means of the proxy solicitation. Again, *Schlick v. Penn-Dixie Cement Corp.*, *supra*, characterizes this element as one of "transaction causation"; Judge Oakes's opinion quotes with approval this statement from *Weiss v. Sunasco, Inc.*, 316 F.Supp. 1197, 1205 (E.D.Pa. 1970):

> "...The proper test is whether the proxy solicitation is 'an essential link in the accomplishment of the transaction' giving

> rise to the litigation, irrespective of the fact that other possibilities were available to management." 507 F.2d at 383.

See also Robbins v. Banner Industries, Inc., 285 F.Supp. 758 (S.D.N.Y. 1966); Barnett v. Anaconda Co., 238 F.Supp. 766 (S.D.N.Y. 1965); Epic Enterprises, Inc. v. Brothers, 395 F.Supp. 773 (N.D.Okla. 1975); Walner v. Friedman, 410 F.Supp. 29 (S.D.N.Y. 1975). This requirement of causal connection reflects the purpose of Section 14(a), as described by the Supreme Court in J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964):

> "The purpose of §14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." (emphasis added)

In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970), the Court observed that the proxy statute:

> "[W]as intended to promote 'the free exercise of the voting rights of stockholders' by insuring that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.'" (emphasis added)

In the case at bar, count 1 of the indictment alleges a number of illegal acts on the part of defendants Fields, Friedman and Davis. However, none of these acts, all of which had been accomplished prior to the stockholders' meeting referred to in the TDA proxy solicitation, bore any direct relationship to the business sought to be accomplished at the meeting, and referred to in the proxy statement. Accordingly, direct "transactional causation", resulting from the non-disclosure of those prior acts, cannot be demonstrated.

The remaining argument left to the Government is that those prior acts so reflect upon the character of Mr. Friedman, one of the three nominees for election as director, that they should have been disclosed in the proxy solicitation. But I reject that argument, on the authority of Judge Owen's decision in Levy v. Johnson, et al, ___ F.Supp. ___ (S.D.N.Y. Feb. 16, 1977) (Dkt.No. 76 Civ. 1178). In Levy, plaintiff claimed a Section 14(a) violation in that the defendants failed to include in proxy material the fact of previous improper payments to foreign governments; plaintiff alleged that this non-disclosure resulted in the re-election of the defendant directors, who then made further improper payments abroad. Judge Owen, dismissing the complaint, held that the necessary element of "transaction causation" was missing. His opinion reads in pertinent part:

> "Section 14(a) was designed 'to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.' J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964). In the instant case, the only corporate action sought to be authorized by the proxy solicitation in question was the directorial elections of 1970 through 1975. The alleged improper payments were not the subject of the proxy solicitation. If at all, they represent a breach of defendant directors fiduciary duty to their

> corporation. Lacking, therefore, is the 'transaction causation' component of a section 14(a) claim that is required by the Second Circuit. Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 381-83 (2d Cir. 1974); Walner v. Friedman, 410 F.Supp. 29, 32 (S.D.N.Y. 1975).
>
> "Plaintiff's argument, that 'but for' the proxy violations the defendant directors would not have been re-elected and could not have subsequently authorized the alleged improper payments, does not meet the transaction causation standard. If the court were to adopt the plaintiff's standard, any suppression of a director's impropriety in proxy materials for re-election, followed by a further impropriety after re-election, would state a claim under federal law. It was not intended that, by reason of a proxy violation, a purely state claim might be so transformed into a federal cause of action. Count II of plaintiff's complaint must be dismissed for failure to state a claim upon which relief can be granted." Slip opinion, at 4-5.

In the light of these authorities, count 4 of the present indictment must be dismissed as to all defendants named in that count.

I reach a different conclusion in respect of count 5; and, in so doing, again rely upon a case decided by Judge Owen, Securities and Exchange Commission v. Kalvex, Inc., 425 F.Supp. 310 (S.D.N.Y. 1975). In that case, proxies were solicited for the election of one Ingis as a director. In its civil complaint, the S.E.C. charged Ingis, among others, with participating in "a scheme to funnel money through a dummy corporation for the purpose of secretly receiving kickback payments from a Kalvex supplier"; it was also charged "that Ingis siphoned off corporate funds from Kalvex for personal use by submitting expense vouchers and obtaining reimbursements therefor from Kalvex for expenses unrelated to any corporate purpose." 425 F.Supp. at 312. Judge Owen held that such activities were material in respect of the stockholders' decision whether or not to re-elect Ingis as a director:

> "I find that these facts were material and therefore were required to be disclosed in the proxy statements in accordance with Item 7 of Schedule 14A. I further find that these facts were concealed, in violation of Rule 14a-3. Ingis knew he was standing for election as a director; he knew that the proxy statements which had been filed and distributed were false and misleading. I believe that a stockholder would have carefully weighed his vote had these facts concerning Ingis been revealed. One does not elect as a director an individual who is using the corporation he represents for personal gain." 425 F.Supp. at 315. (emphasis added)

In the case at bar, count 5 of the indictment relates to a solicitation of proxies from Westcalind stockholders, for the purpose of electing Messrs. Fields, Berge, Davis and Friedman, as directors of that corporation. Count 1 of the indictment, at ¶10 (e), alleges that in March of 1971 Fields and Friedman:

> "...caused Westcalind to pay a 'finder's fee' of $50,000 to Bernardi Resources Corp. ('Bernardi'), a private investment company, which had not and did not perform any service of any kind to Westcalind or anyone else in connection with said acquisition, and arranged for Bernardi to kick back $35,000 in cash to said defendants;..."

This is precisely the sort of direct depradation of corporate assets by a director that was presented in *Kalvex*.

I perceive no difficulty in reconciling the decisions in Levy and Kalvex. Where individuals present themselves for election as directors of a corporation, and fail to disclose in proxy solicitations that they have, in effect, been stealing from the very corporation which they desire to continue to "serve", the necessary element of "transaction causation" is present, and a violation of Section 14(a) arises. To hold otherwise would make a mockery of the proxy statute and regulations. That is the situation presented by Kalvex; that is the situation alleged in the present indictment, when one reads count 1 together with count 5. However, prior acts of individuals which are not directly related to the affairs of the corporation are not material, within the Section 14(a) context, as a matter of law. That is the teaching of Levy; and it is no answer to say that such actions reflect generally upon the character of the individuals standing for election. It is for this reason that count 4 of the indictment, relating to the TDA proxy solicitation, is deficient. None of the acts alleged in count 1 of the indictment relates to direct looting of TDA by any of the defendants. While the indictment charges certain defendants with manipulation of TDA common stock, and the acquisition and resale of certain shares of TDA stock in a manner that could certainly be regarded as fraudulent, the corporation's assets were not looted or depleted in any way. Purchasers of TDA common stock may have been defrauded; sellers of previously restricted TDA stock may have been defrauded; these transactions may very well cast certain of the defendants in an unflattering light; but the facts as pleaded by the Government do not give rise to a potential violation of Section 14(a) in respect of the TDA proxy solicitation.

Accordingly count 4 of the indictment is subject to dismissal on this alternative ground as well. Count 5 is, of course, dismissed for the reasons stated under Point I _supra_. If that determination should be reversed by higher authority, then count 5 will be sent to trial, with the guilt or innocence of each of the individual defendants named in that count to be resolved upon the trial.

III.

OTHER DISPOSITIVE MOTIONS

Various other contentions are made by the defendants in their motion papers. Those particular arguments, which I find to be mostly lacking in merit, are discussed below.

A. Multiple Conspiracies

Counsel for Fields and Friedman make the familiar—if not obligatory—motion to dismiss the conspiracy count for the reason that it avers multiple schemes. The present motion may be somewhat unorthodox, though, in that it has been made in advance of trial, whereas this ritual is generally observed after the Government has submitted its case in order that counsel may marshal facts indicating that the proof was indeed at variance with the averment of a single conspiracy.

Noting that the prosecution of activities which occurred prior to November 10, 1971 would be prohibited by the applicable five year statute of limitations, 18 U.S.C. §3282, defendants contend that the indictment includes the Westcalind commission (paid in March, 1971) and the April and May, 1971 ERD kick-backs solely for the purpose of reviving them as actionable offenses.

The six to eight month interval between said transactions and the public offering is cited as proof that those activities could not have been undertaken as part of a scheme whose intention was to defraud investors.

A fair reading of the indictment does not support this claim. A single conspiracy which employed two devices—the Zammas manipulation and the deficient prospectus—is alleged. The Westcalind "finders fee" and the ERD kick-backs are not means to the accomplishment of the substantive crime, but simply facts whose omission from the November prospectus caused that document to work a fraud upon investors. In other words, the conspiracy consisted not in the plan to do those acts, but in the agreement to conceal them from purchasers of TDA stock at the public offering. Understood as such, the authority cited by defendants becomes plainly distinguishable, and the indictment neither "confusing", "difficult to understand" nor unlike many other conspiracy prosecutions which have been tried in this district, see _e.g._, _United States v. Aloi_, _supra_ at 592, 599-600. Moreover, in a practical sense the exclusion of evidence concerning the ERD schemes as directed _supra_ goes a long way towards alleviating this problem.

B. The Section 17 Violation (Count Two)

Counsel for Fields and Friedman attack the sufficiency of Count Two on the grounds that it fails to state with specificity the manner in which interstate commerce was used[11] to further the conspiracy and neglects to identify the person or persons defrauded. These contentions are without merit.

As regards the former, counsel express their dissatisfaction with the mere tracking of the statutory language of Section 17 as contained in paragraph nine of the indictment. No other specifics concerning the use of interstate facilities of commerce are set forth. However, the rule has long been established that an indictment will be deemed suitably detailed if it enables an accused to prepare a defense and to effectively raise the claim of double jeopardy in the event that a second prosecution, flowing from the same action, is initiated. United States v. Debrow, 346 U.S. 374 (1953); Hagner v. United States, 285 U.S. 427 (1932); United States v. Cohen, 518 F.2d 727 (2d Cir. 1975). This test is amply met by the elaborate pleading herein, which describes in depth the means and the objective of the alleged deception. The use of the mails or other instrumentality of interstate commerce is simply the jurisdictional predicate of this provision, and consequently the failure of the indictment to set forth the exact manner in which these facilities were used does not hinder the defendants' ability to prepare their defense to the merits of the charge. Moreover, unlike the mail fraud statute, 18 U.S.C. §1341, each utilization of interstate means of commerce does not constitute a separate offense thereby raising potential double jeopardy complications.

United States v. DeSapio, 299 F.Supp. 436 (S.D.N.Y. 1969), relied upon extensively by movants, is wholly inapposite. In that case, defendants were charged with conspiring to violate 18 U.S.C. §§1951 (the Hobbs Act), 1952 (The Travel Act) and 1341 (the Mail

Fraud statute). This last offense-object was pleaded in the bare-bones language of the statute and was wholly devoid of averments of the behavior which constituted the crime. Except by reference to another portion of the indictment, the use of the mails was not specifically averred. This defect was obviously fundamental, unlike that complained of herein, since the accused there were unable to prepare their defenses to the merits of the charge.

In passing on this issue Judge Metzner noted that even the actual use of the mails, which is the very gist of a Section 1341 violation, was not effectively pleaded:

> "The indictment does not even state whether the letter was placed in the mails, which is the essential element of mail fraud. The letter could have been hand-delivered, which is not an uncommon practice in this city." 299 F.Supp. at 446.

Plainly, this statement, made in the context of a mail fraud charge, cannot be made to stand for the proposition that the dates, places and contents of mailings must be set forth in a Section 17 prosecution.

Of course, the failure of the Government to demonstrate at trial that interestate commerce facilities were used to further the scheme would deprive this Court of jurisdiction over the offense and require dismissal of the charge. To the extent that this information is sought prior to trial, it may be procured through a proper demand for a bill of particulars. It need not be averred in detail in the indictment.

Similarly, Fields and Friedman contest the validity of count two because it fails to identify by name the victims of the securities fraud. This omission does not render the charge legally infirm; quite obviously the averred scheme was aimed at all purchasers of TDA common stock who invested in that company pursuant to the November 10, 1971 public offering. The fact that the individuals thus deceived are not set forth with particularity does not hamper the defendants' ability to meet the merits of the allegation, and further, it is not an impermissible abdication of the grand jury's duty nor an invitation to prosecutorial abuse, as was the case in United States v. Agone, 302 F.Supp. 1258 (S.D.N.Y. 1969).

There, the court dismissed an indictment charging extortion under the organized labor statutes, 29 U.S.C. §§530, 411(a)(2), on the ground that it failed to name the individual threatened. With characteristic incisiveness, Judge Frankel noted that since there were a "substantial" number of potential targets of defendant's intimidation:

> "It has left the prosecution free to fill in this vital missing element—free, in a way which is constitutionally grave whether or not it is highly probable, to name someone different from the one intended by the grand jury. A prosecutorial power 'to roam at large' in this fashion is not allowable. [citation omitted]" 302 F.Supp. at 1261.

These considerations are patently irrelevant here, where the stock scheme, constituting a single offense, regardless of the number of victims, is set forth with a wealth of detail.

Thus, unlike the situation in *United States v. Agone*, *supra*, the failure to include the names of the misled TDA investors is a matter of "pleading etiquette or esthetics", and not a concern touching upon "substantial rights of the most essential mind." 302 F.Supp. at 1259. See *e.g.*, *United States v. Niedelman*, 356 F.Supp. 979, 982 (S.D.N.Y. 1973) (Mail Fraud); *United States v. Dorfman*, 335 F.Supp. 675, 679 (S.D.N.Y. 1971) (Wire Fraud). Needless to add, the lack of any proof at trial that the scheme was in connection with "the offer of sale" of securities will mandate dismissal of the charge for lack of subject matter jurisdiction.

C. The False Statement Violation (Count Three)

1. Objection to Venue

Defendant Davis moves to dismiss count three of the indictment for improper venue.

Count three alleges violation of the False Statement Act, 18 U.S.C. §1001, which provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Within the context of the present case, the violation is alleged to consist of the omission from the prospectus filed with the SEC, covering the public sale of the TDA shares, of the matters set forth in count one.

Davis contends that venue can lie only in the District of Columbia, under the holding in Travis v. United States, 364 U.S. 631 (1961). In Travis a union official was indicted in the District of Colorado for violation of 18 U.S.C. §1001. The false statement in question was contained in an affidavit, sworn to in Colorado, to the effect that Travis was not a communist. Travis mailed this affidavit to Washington for filing with the National Labor Relations Board, in order to trigger a representation investigation by the NLRB. Under the labor statute as it then read, no such investigation could be made "unless there is on file with the Board" such an affidavit. The Court reasoned from this language that until the filing of the affidavit was completed in Washington, there was no "matter within the jurisdiction" of the Board under 18 U.S.C. §1001; and that in consequence venue lay in the District of Columbia but not in Washington. The case turned on narrow facts, a decisive one being that the underlying statutory scheme did not require the filing of the affidavit. Thus the majority opinion observes:

> "Section 9(h) of the National Labor Relations Act, with which we are concerned, did not require union officers to file non-Communist affidavits. If it had, the whole process of filing, including the use of the mails, might logically be construed to constitute the offense. But this statutory design is

> different. It requires that the Board shall make no investigation nor issue any complaint in the matters described in §9(h) 'unless there is on file with the Board' a non-Communist affidavit of each union officer. The filings are conditions precedent to a union's use of the Board's procedures." 364 U.S. at p. 635.

The particular facts in Travis, which arise out of the wording of an unusual statute, bear no meaningful resemblance to the case at bar. As the Government observes in its brief (p. 43), "defendants were required to file the prospectus, in order to make the public offering of stock." That is sufficient to distinguish Travis, which as the Second Circuit observed in United States v. Slutsky, 487 F.2d 832, 839 n. 8 (2d Cir. 1973), cert. den., 416 U.S. 937 (1974) "was meant to be confined to the facts based on the unusual statute involved." That is a wholly appropriate observation, in view of the Supreme Court's language quoted supra.

Defendant's contention, if sound, would establish the United States District Court for the District of Columbia as the only forum in the nation where entrepreneurs, from all 50 states of the Union, submitting prospectuses in obedience to the securities laws, could be indicted under 18 U.S.C. §1001 if the prospectuses are false. The contention is inherently unsound, and I reject it.

Venue is properly laid in "the whole area through which force propelled by an offender operates." United States v. Johnson, 323 U.S. 273, 275 (1944). That principle is codified in the "continuing offense" statute, 18 U.S.C. §3237(a), under which an offense begun in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which such offense was "begun, continued or completed." The Second Circuit held that statute applicable to an 18 U.S.C. §1001 violation in United States v. Candella, 487 F.2d 1223 (2d Cir.) cert. den., 415 U.S. 977 (1974), in which false affidavits and bills of lading intended ultimately to generate HUD funds were prepared, executed and handed to city officials in Brooklyn for conveyance to a central office in Manhattan. The Second Circuit held that venue under the False Statement Act would be in either the Eastern or Southern District of New York:

> "18 U.S.C. §1001 defines the offense as the making of a false or fraudulent statement or representation in a matter within the jurisdiction of a federal agency. The false statements here were intended to produce funds. The statements continued to be false and continued to be within the jurisdiction of the United States not only when initially presented but also upon arrival in Manhattan, where the decision was reached to make the funds available. See United States v. Kenofskey, 243 U.S. 440, 37 S.Ct. 438, 61 L.Ed. 836 (1917). Venue for all counts thus was properly laid in the Southern District of New York." 487 F.2d at 1228.

United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. den., 425 U.S. 934 (1976), while not arising under the False Statement Act, is consistent with these general principles. Defendants were charged with false proxy statements in violation of 15 U.S.C. §78ff(a). They contended that venue would lie only in the District of Columbia, where the proxy statements were filed. Reliance was placed on Travis. The Second Circuit, distinguishing Travis, held that venue was properly laid in the Southern District of New York:

> "Appellant seeks to come within the Travis holding by arguing that just as in Travis where the filing of the non-Communist affidavit was simply a prerequisite to future conduct, resort to NLRB processes, so the filing of a proxy statement is merely the prerequisite to future conduct, the solicitation of proxies. The argument is unsound.
>
> "In Travis, the labor board had no jurisdiction to make an investigation of labor practices 'unless there is on file with the Board' a non-Communist affidavit. Here the filing of the proxy statement is part of the continuous process of the solicitation of proxies. Proxy statements are filed only at such time as the persons filing require proxies for some corporate purpose. The filing and solicitations are part of the same process. We hold that there was venue in the Southern District of New York." 527 F.2d at 326-7.

The present defendant argues that a prospectus is so different in nature from a proxy statement that Travis should apply. I perceive no meaningful difference. The filing of a registration statement and prospectus is "part of the continuous process" of the solicitation of public funds, just as the filing of a proxy statement is part of the "continuous process of the solicitation of proxies." Furthermore, just as in Candella, supra, the allegedly false prospectus was "intended to produce funds." Unlike the non-communist affidavit in Travis, filing of the prospectus was required by the pertinent statute. Travis is inapplicable; the continuing offense statute *is* applicable; and the objection to venue is rejected.

2. The Legal Sufficiency of Count Three

Counsel for Fields and Friedman move to dismiss the false statement count on the theory that it is too indefinitely and vaguely pleaded. This shortcoming stems from the fact that the indictment does not set forth de novo the specific false statements or material omissions allegedly contained in the prospectus, but rather incorporates by reference the relevant facts averred in support of the conspiracy charge.

Defendants complain that as a result of this abbreviated type of accusation, they cannot make the necessary determination of which statements are deemed to be false in the prospectus. Resort to the "means" section of the conspiracy charge (paragraph 10) does not, to counsel's satisfaction, provide the required information. There, the Zammas manipulations (set forth in subparagraphs (a) through (c)) are not averred to have been deliberately omitted from the prospectus and cannot therefore be the basis of the false statement claim. The Westcalind and ERD transactions do not suffer from this infirmity; however, standing alone they still fail to supply requisite data. Citing the language of Section 17 as pleaded in the "object" section of the conspiracy charge (paragraph 9), defendants contend that count three does not designate which of the statements affirmatively made in the prospectus were made misleading by virtue of the concealment of the two kickback schemes. Apparently defendants' counsel construe a prosecution under 18 U.S.C. §1001 for omissions to require, in the pleading, an indication of which representations actually made were rendered misleading in the light of the averred concealment, see Spielman v. General Host, 402 F.Supp. 190 (S.D.N.Y. 1975) (Weinfeld, J.).

This argument is admirable in its sophistry only, for the plain language of the statute utterly refutes any such interpretation. In prohibiting false statements accomplished through concealment or "cover-up", Section 1001 does not utilize any language comparable to that of Section 17, requiring actionable omissions to be such as to render "...the statements made, in the light of the circumstances under which they were made, not misleading."

Moreover, counsel's professions of ignorance of the matters charged under count three are indeed more feigned than real. Defendants have been apprised by this lengthy indictment of what facts the Government believes were impermissibly omitted from the prospectus; obviously, what was made deceptive by these concealments was the overall picture of TDA's true financial status as presented in the prospectus. Defendants' construction of the pleading requirements for 18 U.S.C. §1001 would require in omission cases a line by line analysis of the offending document, with annotations on each of the statements made misleading by the undisclosed facts. Pleading of this complexity is not contemplated by the statute itself, nor by general standards of sufficiency mandated by constitutional concerns.

The cited language from Spielman v. General Host, supra, a case involving the materiality of omissions from exchange offer materials, cannot be contorted into requiring such specificity in a criminal proceeding under the false statement provision. That case simply does not speak to the question of the sufficiency of indictments for Section 1001 violations, and as such does not bolster counsel's position.[12]

D. Sufficiency of the Use of the Mails with Respect to Counts 7-10

Counsel for Sandberg has moved to dismiss counts 7 through 10, invoking the "Kreisler kick-back" described supra, on the ground that said transaction lacked a sufficient nexus with the mails to sustain federal jurisdiction. The memorandum of law submitted on behalf of this defendant in support of the motion portrays the letters in question as "pro forma opinion letters" relevant to Sandberg's purchase of TDA stock, allegedly funded by his share of the Kreisler kickback. Assuming the truth of these assertions, defendant's counsel urges that this investment, and its related correspondence, was too remote from the fraudulent transaction averred to come within the purview of 18 U.S.C. §1341.

This argument may prove to be well-founded; however, there are not presently before the Court sufficient facts to make such a determination. The indictment does state that the mailings were "for the purpose of executing or attempting to execute" the scheme, and by virtue of that declaration, the Government is entitled to submit evidence necessary to support such a claim. It may be that defendant's characterization of the correspondence is accurate and that such mailings were incidental to a transaction which itself was wholly collateral to the Kreisler kickback scheme, thereby requiring dismissal, compare United States v. Brown, ___ F.2d ___ (2d Cir. May 16, 1977) (Dkt. No. 77-1033) with Gordon v. United States, 358 F.2d 112 (5th Cir. 1966). Such a decision must await submission of the Government's case.

IV.

MOTIONS FOR SEVERANCE

Applications have been made to sever certain counts and individuals from the trial of the indictment. In the event that these matters do come before the Court, they are disposed of as follows.

The motion to sever counts 6 through 11, unopposed by the Government, is granted.

Defendant Berge has moved for a severance based upon his alleged physical incapacity to travel from his California domicile to New York, and to withstand the stress of trial, as attested to by the statements of physicians who examined him.

The Government opposes the granting of such relief at this time. Instead, the Government asks this Court to direct that a physician selected by the Government be sent from New York to California for the purpose of examining Mr. Berge, and thereafter forwarding his opinion to the Court and counsel as to whether or not Mr. Berge is fit to come to New York for trial.

For the reasons that will appear in the following discussion, the Court grants at this time Mr. Berge's motion for severance on the basis of ill health. The Court bases its action upon the medical evidence presently before it.

Among other letters, there has been submitted to the Court a letter dated December 7, 1976, from Harold Lovitz, M.D., of Encino, California. Dr. Lovitz has been Mr. Berge's personal physician since 1960. Dr. Lovitz states that Mr. Berge developed serious hypertension in 1972; that in an examination on November 30, 1976, this condition was found to have worsened significantly; and that, in respect of Mr. Berge's condition on December 7, 1976:

> "Mr. Berge suffers from severe hypertension that is aggravated by emotional stress or trauma. For this reason, I am of the opinion that any court proceedings involving this patient would place his health and indeed his life in the greatest jeopardy. The stress entailed in the preparation for trial, examination and cross-examination, and the mere appearance in court would precipitate a cerebro-vascular accident resulting in disability and even death."

In support of his application, Mr. Berge has also submitted a letter dated April 4, 1977 from Stanley S. Franklind, M.D. of Los Angeles. Dr. Franklind first examined Mr. Berge on March 7, 1977, at which time blood pressure values as high as 216/124 were obtained. Mr. Berge was hospitalized for observation and tests for one week beginning on March 25; Dr. Franklind states that further hospitalization for additional tests and possible thyroid surgery are contemplated in about one month. Dr. Franklind expresses his opinion that "Mr. Berge is in no condition to either travel or participate in any legal proceedings for a minimum of three months."

These medical opinions, which as noted were obtained by Mr. Berge, were made known to counsel for the Government. There then ensued a dialogue between counsel for Mr. Berge and for the Government, with a view towards having Mr. Berge examined by a "neutral" physician. According to the statements of counsel made in open court on April 14, 1977, counsel for Mr. Berge submitted a list of five physicians to counsel for the Government; none of these was acceptable to the Government; the Government then proposed a physician to counsel for Mr. Berge, who was in turn rejected. Eventually, however, as the result of conversations between the office of the United States Attorney and medical authorities at the Cedars of Lebanon medical facility in California, Louis S. Fishman, M.D. of Beverly Hills, California was selected to make a further examination of Mr. Berge. Dr. Fishman, a diplomate of the American Board of Internal Medicine, was acceptable to counsel for Mr. Berge. In accordance with this agreement of counsel, Dr. Fishman examined Mr. Berge on March 17. Dr. Fishman's report, in a letter of March 23, 1977, recites his findings of "extreme hypertension, complicated by and contributed to by a severe physiological anxiety reaction", complicated by "serious cardiac arrhythmia", resulting from a combination of "organic cardiac disease and stress." Dr. Fishman's report concludes:

> "In my opinion Mr. Berge should be hospitalized for diagnosis and treatment of the above conditions. Medically I do not feel that he should travel out of this city. I am fearful of life threatening cardica or cerebrovascular complications should he be subjected to travel and especially stressful situations such as one might experience in a court proceeding."

While counsel have not submitted to the Court an order in respect of Dr. Fishman's appointment prior to his examination of Mr. Berge on March 17, such an order was handed up at the hearing on April 14. That order, which should be regarded as taking effect nunc pro tunc provides inter alia for the examination by Dr. Fishman of Mr. Berge on March 17, pursuant to Rule 706 of the Federal Rules of Evidence; and for the compensation of Dr. Fishman by the United States Attorney for the Southern District of New York.

In these circumstances, I do not hesitate to regard Dr. Fishman as a court-appointed physician; and I see no reason for the further examination which the Government requested at the hearing on April 14.

All physicians who have examined Mr. Berge concur that, in the present state of his health, he should not attempt to undergo the stress of travel or trial. I accept these medical findings and recommendations, and accordingly direct a severance of Mr. Berge from the trial. The resulting period of delay, in respect of Mr. Berge, constitutes excludable time within the context of the Speedy Trial Act. 18 U.S.C. §3161(h)(4).

Counsel for the parties are directed further to advise the Court in respect of Mr. Berge's physical condition not later than 120 days from the date of this opinion.

CONCLUSION

For the foregoing reasons, this Court has issued an order stating as follows:

1. The Securities and Exchange Commission having breached a duty to defendants which required them to disclose the fact of its having made a criminal reference of this matter prior to the defendants entering into a civil consent judgment with said agency, paragraphs 10(d) through 10(h) and 11(e) of the indictment which relate to transactions and matters specifically referred to in said settlement, are hereby stricken, in the exercise of the Court's supervisory powers.

2. In consequence of this ruling, counts four through eleven of this indictment are dismissed in their entireties.

3. In further consequence of this ruling, the indictment as to defendants Frederick M. Friedman, Peter S. Davis and Alan E. Sandberg is dismissed.

4. As an alternative basis for dismissal, those portions of counts one through three of the indictment relating to the ERD transactions, described in paragraphs 10(f) through 10(h) of the indictment, are dismissed for failure to state an offense.

5. As an alternative basis for dismissal, count four of the indictment is dismissed for failure to state an offense.

6. Counts six through eleven of the indictment are severed from the trial in any event with the consent of all parties.

7. Defendant Eric Berge is severed from trial of this action for medical reasons, pursuant to the Court's findings with

respect to his physical condition reached following a hearing previously held.

8. Trial of Douglas P. Fields on the manipulation of the price of TDA stock averred in paragraphs 10(a) through 10(c) of the indictment will commence on May 31, 1977 at 10:00 a.m., or as further ordered by the Court.[13]

9. Trial of Eric Berge on count twelve of the indictment will take place at a date and time to be fixed by further order of this Court.

10. All other motions are denied.

Dated: New York, New York
June 2, 1977

Charles S. Haight, Jr.

CHARLES S. HAIGHT, JR.
U. S. D. J.

Footnotes

1. The facts set forth in paragraphs 2-8 of these Findings are derived from the SEC civil complaint, GX19 on the hearing. So far as the Court is aware, they are not disputed.

2. Fields, Friedman, Davis, Sandberg, Berge, TDA, and Westcalind—the defendants in the civil action which the SEC had commenced on September 16, 1975—all consented to the entry of judgments against them. The various consents provided for the following relief which the SEC had demanded in its complaint:

   (a) The SEC's complaint sought broad injunctive relief against the seven defendants in the civil action; all of the defendants consented to the injunctive relief which the SEC had demanded;

   (b) In connection with the ERD transactions, the SEC's complaint sought payment of $435,000.00 by Fields, Friedman, and Davis to TDA, which was the total amount of the alleged profits derived by all parties (not merely Fields, Friedman, and Davis) to these transactions. In their consents, Fields, Friedman, and Davis agreed to pay that entire amount to TDA, and fully collateralized that amount, although the SEC's own investigation revealed that the total amount received by these defendants from the ERD transactions was only $72,250.00, and the defendants were still subject to civil lawsuits from the original sellers of the securities involved in the ERD transactions;

   (c) In connection with the Eagle Roofing finder's fee, the SEC's complaint sought payment of $100,000.00 by Fields and Friedman to TDA, which was the total amount of the allegedly unlawful finder's fee. In their consents, Fields and Friedman agreed to pay that entire amount, which they fully collateralized, although the SEC's own investigation revealed that $18,000.00 of that amount had never been received by any of the defendants;

   (d) In connection with the Trophies, Inc. finder's fee, the SEC's complaint sought payment of $50,000.00 by Fields and Friedman, to Westcalind, which was the total amount of the allegedly unlawful finder's fee. In their consents, Fields and Friedman agreed to pay that entire amount, which they fully collateralized, although the SEC's own investigation revealed that $15,000.00 of that amount had never been received by any of the defendants;

   (e) The SEC's complaint sought an order prohibiting Fields and Friedman and Berge from acting as either officer or director of TDA or Westcalind; the consent judgments prohibited Fields, Friedman and Berge for a two-year period from serving as directors of TDA or Westcalind, and, further, from serving as chief executive officer of either company for a two-year period. However, Fields was permitted to remain president, in which capacity he would be chief operating officer, and Friedman was permitted to retain his positions as well;

(f) The SEC complaint sought an order prohibiting Fields and Friedman from voting their shares of TDA and Westcalind stock for a "just and proper" period of time; Fields and Friedman consented to such a prohibition for a two-year period;

(g) The SEC complaint sought an order appointing a receiver for TDA and Westcalind; the consents implemented this request to the SEC's satisfaction by providing for the appointment of independent directors for TDA and Westcalind, as well as Fields' and Friedman's resignations from both boards of directors and the appointment of new chief executive officers for both corporations;

(h) Defendant Davis consented to the most severe administrative sanction available to the SEC, a lifetime resignation from practice before the SEC, as a result of which Davis was forced to resign from the law firm he had built up, which specialized in SEC practice, and was forced to give up the practice of law;

(i) Defendant Sandberg consented in all respects to all relief which the SEC complaint had sought against him, as did defendant Berge.

3. Santobello v. New York, 404 U.S. 257 (1971).

4. United States v. Brown, 500 F.2d 375 (4th Cir. 1974); United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973).

5. Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976).

6. Palermo, n. 5 supra, at 545 F.2d 296; Correale v. United States, 479 F.2d 944 (1st Cir. 1973); United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (en banc), cert. den., 417 U.S. 933.

7. United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975); United States v. Paiva, 294 F.Supp. 742 (D.D.C. 1969); United States v. Carter, n. 4 supra; United States v. Pollock, 417 F.Supp. 1332, 1342 (D.Mass. 1976); cf. In the Matter of Doe, 410 F.Supp. 1163 (E.D.Mich. 1976); United States v. Minnesota Mining & Manufacturing Co., No. 3-75 Cr. 21 (D.Minn. 1976). The Second Circuit recognizes the supervisory responsibility of the courts to foreclose prosecution of an indictment if tainted by unfair governmental conduct. United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976).

8. Kreisler and Weston were businessmen and acquaintances of Friedman. They were involved on the periphery of certain of the violative acts in question. The SEC regarded their testimony as vital to its inquiry, particularly since the principal actors declined to testify. Following negotiations with counsel for these two individuals, and in accordance with an express agreement reached with counsel, the SEC's New York office recommended to the Division of Enforcement that neither Kreisler nor Weston be named in a civil or criminal action. The Division of Enforcement approved the recommendation.

9. The sanctions are set forth in detail in footnote 2.

10. I do not overlook the fact, stressed by the Government, that each consent to judgment in the civil litigation contained a clause which read:

> "This consent is given by defendants Fields, Friedman and Davis voluntarily and no promise or threat of any kind whatsoever has been made by plaintiff Commission or any member, officer, agent, or representative thereof to induce Fields, Friedman, and Davis to enter into this consent."

Counsel for defendants, in the course of pressing their "silence is assent" argument, denigrated this paragraph as "boilerplate". Whatever effect such standard disclaimers may have in other circumstances, cf. Blackledge v. Allison, ___ U.S. ___ (May 2, 1977), 45 U.S.L.W. 4435, it cannot serve to excuse the SEC's wrongful concealment in the case at bar.

11. The argument is also raised in the context of the conspiracy charge. Since the Court holds that the averments regarding the use of interstate facilities are sufficient for purposes of the substantive count, they will perforce suffice for purposes of the conspiracy. Wong Tai v. United States, 273 U.S. 77, 81 (1927); United States v. DeSapio, 299 F.Supp. 436, 445 (S.D.N.Y. 1969) ("It is not necessary to describe the substantive offense which is the object of the conspiracy with the particularity required in an indictment for that offense.").

12. This motion also advances the qualified theory that the false statement provision encompasses only actual misstatements and not failures to speak.

"...[T]hese alleged omissions from the prospectus cannot as a matter of law be the type or kind of false, factitious and fraudulent representations outlawed by Section 1001", Main Memorandum submitted on behalf of Fields and Friedman at 37.

This contention is frivolous and is unsupported by United States v. Adcock, 447 F.2d 1337 (2d Cir.), cert. den., 404 U.S. 939 (1971).

There, defendant was prosecuted under this section for having filled out an alien's immigration form and allowing the alien to sign it thereby creating the mistaken impression as to the actual author of the responses. The case was premised on the position that defendant had in this manner caused a false statement to be made. Noting that "Nowhere does the form contain any assertion by the applicant that he himself prepared the form," 447 F.2d at 1338, the Second Circuit reversed the conviction on the ground that no statement whatsoever had been made. The case can hardly be said to stand for the proposition that certain kinds of omissions cannot be prosecuted under the false statement statute.

13. Subsequent to the issuance of that order, the Court on consent stayed the trial pending resolution of a possible interlocutory appeal from the order.

Catner

A 121

U. S. DISTRICT COURT
FILED
JUL 7 1977
3:15 PM
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

-against- :

DOUGLAS P. FIELDS, et al, :

Defendants. :

- - - - - - - - - - - - - - - - - - x

76 Cr. 1022-CSH

MEMORANDUM OPINION AND ORDER

#46139

HAIGHT, District Judge:

The Government has moved for rehearing and reconsideration of two aspects of the Court's prior opinion of June 2, 1977 and implementing order, entered in response to defendants' motion to dismiss the indictment. While defendants attack the Government's motion, and its supporting documents, on technical grounds, I shall consider it on the merits. For the reasons stated below, the motion for rehearing is granted; and the Court, upon consideration, adheres to its prior opinion and order.

I.

In its prior opinion and order, the Court struck paragraphs 10(d) through 10(h) and 11(e) of the indictment, and struck counts four through eleven, on the ground (as the Government accurately states in its motion) that theSEC breached a duty to disclose to defendants the criminal reference it had made to the United States Attorney's Office. The Government now contends—as it did during the hearings and in its original briefs—that the appropriate remedy lies in vacating the civil consent judgment, while permitting the criminal indictment to go to trial.

I carefully considered that alternative in formulating the prior opinion and order. I rejected it then, for reasons previously stated and not here reiterated. In essence, I do not regard vacatur of the civil judgment as an adequate remedy in the circumstances of the case, in respect of either the defendants' position or the necessary prophylactic effect upon the SEC.

The Government advises the Court, in support of its present motion, that the SEC "is prepared to seek to vacate the injunction and ancillary relief obtained therein", provided that the Court determines that "the appropriate alternative remedy in the case would be directed towards the civil relief obtained by the Commission" (affidavit of David A. Cutner, Esq., at p. 2, quoting representation of Wallace Timmany, Assistant Director of the Division of Enforcement, SEC). But since the Court declines to make the threshold determination, the SEC's state of preparation has no office to perform.

Mr. Timmany also represents that, on the basis of the Court's prior findings, "the Commission has undertaken an independent inquiry in this matter at the conclusion of which the Commission will take all actions which it deems appropriate." I am gratified, if not surprised, by this intelligence; it is an appropriate response to the Court's findings; but it does not relieve me of my responsibilities within the context of the case before me. I remain of the view that, in the circumstances of the case, dismissal of the indicated portions of the indictment is the proper remedy.

II.

The Government also urges reconsideration of the alternative ground for dismissal of count 4 of the indictment which charged violation of the proxy solicitation statute, 15 U.S.C. §78(n), and Rule 14a-9 promulgated thereunder, 240 C.F.R. §14a-9, in that the defendants' averred theft from Westcalind Corporation ("Westcalind"), a company in which TDA Ind., Inc. ("TDA") held 34% of the voting stock, was not disclosed. As previously discussed, the principal subject of that solicitation was the re-election of certain defendants, charged with involvement in the "Westcalind kick-back", to the board of directors of TDA.

This Court based its prior ruling on the rationale of Securities and Exchange Comm. v. Kalvex, Inc., 425 F.Supp. 310 (S.D.N.Y. 1975), and Levy v. Johnson, ___ F.Supp. ___ (S.D.N.Y. Feb. 16, 1977) (Dkt. No. 76 Civ. 1178-RO), wherein Judge Owen held that the proxy solicitation regulations do not require disclosure of a directorship candidate's peculations, if those activities were not practiced upon the corporation to whose board he is seeking election. The papers submitted to the Court in support of the motion for reargument purport to demonstrate that the relationship between TDA and Westcalind was such that an embezzlement from the latter was tantamount to a theft from the former, and that consequently, the TDA proxy solicitation was deficient in failing to reveal the $50,000 swindle averred in count 4 of the indictment.

While the issue is not entirely free from doubt, this aspect of the motion must also be denied for the reason that the Westcalind kick-back was too far removed from the subject of the TDA solicitation to have improperly influenced the shareholders' actions.

Thus, it should be noted that Westcalind's operations were not consolidated with TDA's for financial reporting purposes; indeed, under pertinent authority, consolidation would have been improper since TDA owned less than a majority of Westcalind's outstanding stock, see Regulation S-X, 17 C.F.R. §210. TDA's investment in Westcalind was reflected in its annual report as an "asset", just as was its ownership of other stocks or bonds. Therefore, the kick-back could have influenced the TDA solicitation only if the theft was of such magnitude that it caused Westcalind's financial condition to be substantially overstated, thereby causing its stock to be overvalued, thereby causing TDA's "assets" figure in the annual report to be inflated, thereby causing TDA's shareholders to be misled as to the condition of their company, under the leadership of the individuals standing for election. However, this kind of potential impact is too remote and speculative a ground on which to predicate a criminal violation of the proxy solicitation regulations because the required "transaction causation" is absent. The Court therefore holds that the facts of the instant case do not come within the perameters of SEC v. Kalvex, supra; rather, the disposition is controlled by Levy v. Johnson, supra. See also Lewis v. Elam, CCH F.Sec.L.Rep. ¶96,013 (S.D.N.Y. April 5, 1977).

Accordingly, the motion for reargument is, in all respects, denied.

It is So Ordered.

Dated: New York, New York
July 7, 1977

CHARLES S. HAIGHT, JR.
U. S. D. J.

DAC:jw
6-2852

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
AUG 23 1977
S.D. OF N.Y.

Rec'd in Chambers
6/13/77
5:20 p.m.

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UNITED STATES OF AMERICA, :

-v-

DOUGLAS P. FIELDS, et al., :

Defendants. :

-- x

NOTICE OF MOTION

76 Cr. 1022

S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of David A. Cutner and the prior proceedings and papers submitted herein, the Government will move this Court before the Hon. Charles S. Haight, Jr., United States District Judge, in the United States Court House, Foley Square, New York, New York, at a time and place to be determined by the Court, for rehearing and reconsideration of defendants' motions to dismiss the indictment, and for an order reinstating paragraphs 10(d) through 10(h) and 11(e), and counts four through eleven, of the indictment, and for such other and further relief as the Court may deem proper.

Dated: New York, New York
June 13, 1977

Yours, etc.

ROBERT B. FISKE, JR.
United States Attorney

By: David A. Cutner
DAVID A. CUTNER
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
(212) 791-1931

TO: BENDER & FRANKEL
225 Broadway
New York, New York 10007

ORANS, ELSEN & POLSTEIN
One Rockefeller Plaza
New York, New York 10020

GRAND & OSTROW
375 Park Avenue
New York, New York 10020

KOSTELANETZ & RITHOLZ
80 Pine Street
New York, New York

DAC:jw
6-2852

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-- x

UNITED STATES OF AMERICA,

-v-

DOUGLAS P. FIELDS, et al.,

Defendants.

: AFFIDAVIT

: 76 Cr. 1022

-- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

DAVID A. CUTNER, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and am in charge of the prosecution of above-captioned matter. I make this affidavit in support of the Government's application for rehearing and reconsideration of defendants' motions to dismiss the indictment, and for an order re-instating paragraphs 10(d) through 10(h) and 11(e), and counts four through eleven, of the indictment.

2. In a memorandum opinion dated June 2[illegible] 1977, this Court dismissed said paragraphs and counts on the ground that the SEC breached a duty to disclose to defendants the criminal reference it had made to the United States Attorney's Office. For the purposes of this motion, the Government does not dispute the Court's findings of fact. We do submit, however, that dismissal of these criminal charges is not the appropriate remedy for the misconduct found by the Court to have been engaged in by certain employees of the SEC. In our view, such dismissal serves only to penalize the public and to nullify the work of the Grand Jury and the United States Attorney's Office, all of which were totally blameless in this matter.

By the instant motion, we respectfully ask the Court to reconsider the alternative remedy of vacating the civil consent judgment entered in *SEC* v. *TDA Industries*, *Inc*., *et al*., 75 Civ. 4519 (LWP), in light of the additional facts set forth below.

3. I have been advised by Wallace Timmany, Assistant Director of the Division of Enforcement, that the Securities and Exchange Commission (*i.e*., the Commissioners) has authorized me to make the following representation to the Court:

> "I have been authorized by the Commission for the purpose of this [motion for] rehearing to represent that, on the basis of the factual findings contained in this Court's opinion dated June 2, 1977, should the Court determine that the appropriate alternate remedy in the case would be directed towards the civil relief obtained by the Commission in the matter of *SEC* v. *TDA Industries*, *Inc*., *et al*., then the Commission is prepared to seek to vacate the injunction and ancillary relief obtained therein. I have been further advised that, on the basis of the factual findings contained in the opinion of the Court, the Commission has undertaken an independent inquiry in this matter at the conclusion of which the Commission will take all actions which it deems appropriate."

5. On information and belief, the shareholders of TDA have not been asked to vote on any subject at any time during 1975, 1976, or 1977.

6. Annexed hereto as Exhibit A is a copy of The Annual Report to shareholders of TDA Industries, Inc., for the fiscal year ended June 30, 1972. The Consolidated Statement of Income and Note 1 of the Notes to the Financial Statements reflect the relationship of the activities of Westcalind to the financial condition of TDA. We urge the

DAC:jw
6-2852

Court to reconsider its dismissal of count four on the alternative ground stated in the Court's memorandum opinion in light of the fact that, as appears from Exhibit A, the "Westcalind kickback" constituted a direct depradation of corporate assets by a director.

David A. Cutner

DAVID A. CUTNER
Assistant United States Attorney

Sworn to before me this
13th day of June, 1977

Alma Hanson

NOTARY PUBLIC

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

A 130

TDA Industries, Inc

annual report 1972

EXHIBIT A

SCOPE OF OPERATIONS

TDA is engaged in:

	Location of Facilities	Approximate Percentage of Current Sales Volume
Wholesale and retail distribution of building and hardware supplies	Maine, Massachusetts, Connecticut	60%
Distribution, manufacture and sale of home furnishings	Florida, New York, New Jersey	25%
Distribution to the home consumer of appliances, floor coverings, food products	New York	13%
Operation of leisure time facilities	New York	2%

FINANCIAL HIGHLIGHTS

	For the Year Ended June 30,				
	1968	1969	1970	1971	1972
Net Sales	$6,268,778	$7,369,047	$17,053,018	$20,045,253	$38,636,360
Income from Continuing Operations before Extraordinary Items	$ 183,333	$ 263,526	$ 578,707	$ 810,425	$ 923,310
Net Income	$ 250,327	$ 338,703	$ 419,261	$ 881,746	$ 1,088,250
Earnings per Common Share and Common Equivalent Share from Income from Continuing Operations before Extraordinary Items	$.18	$.24	$.34*	$.36*	$.25

---

* Fully diluted earnings per share were $.01 lower in 1970 and 1971.

	June 30,		Percentage Increase
	1971	1972	
Total Assets	$18,681,657	$29,186,490	+ 56%
Working Capital	$ 7,561,537	$11,517,818	+ 52%
Current Ratio	2.8:1	3.1:1	+ 11%
Shareholders' Equity	$ 9,647,060	$17,416,239	+ 81%
Shareholders' Equity per Common Share*	$3.93	$4.33	+ 10%
Common Shares Outstanding	2,452,171	4,022,757	+ 64%

---

* Based on the number of shares outstanding at June 30.

TO OUR SHAREHOLDERS:

Although fiscal 1972 was a difficult year in some respects, your Company nevertheless made substantial progress in attaining the basic financial and operating strengths necessary to achieve TDA's long term goal of becoming a national competitor in the distribution of building supplies, home furnishings and home services. Management believes that the underlying economic factors influencing these fields will continue to remain favorable throughout the 1970's because of increasing family formations, disposable income, and the desire of the American people to continue improving their standard of living.

Financial Results

For the fiscal year ended June 30, 1972, TDA's sales increased to $38,636,360 from $20,045,253 in the prior year.

Income before extraordinary items rose to $923,310 compared with $810,425 in fiscal 1971. Net income, after all extraordinary items, increased to $1,088,250 in fiscal 1972, up from $881,746 in the previous year.

Because of a substantial increase in the number of shares outstanding as of June 30, 1972, earnings per common share, and common equivalent share before extraordinary items, declined to $.25 per share compared with $.36 per share in fiscal 1971. Extraordinary gains in fiscal 1972 were $.05 per share, up from $.04 per share one year before. Thus, net earnings per share after extraordinary items were $.30 per share versus $.40 per share ($.38 per share assuming full dilution) in the prior fiscal year.

The substantial increase in number of shares used in calculating earnings per share at June 30, 1972 resulted primarily from the issuance of shares for acquisitions, investments, private placements, satisfaction of commitments created in prior acquisitions and private placements, and cancellation of indebtedness.

These acquisitions, investments, private placements and debt retirements, combined with TDA's increased profits and cash flow, substantially improved the Company's financial position. Net worth at June 30, 1972 rose to $17.4 million from $9.6 million at June 30, 1971. Total assets at June 30, 1972 increased to $29.2 million from $18.7 million and working capital increased $4 million to $11.5 million at June 30, 1972.

Because of this improving financial position and operating results, The Prudential Insurance Company of America entered into a new loan arrangement with TDA just nine months after Prudential's initial investment in September 1971 of $4,000,000 under a 15 year, 9-5/8% unsecured note. In June 1972 this note was refinanced by Prudential, providing for a $6,000,000, 15 year unsecured loan with final maturity at June 1987 at the reduced interest rate of 9.4% per annum.

In addition, because of the Company's growth in the New England area, the Society for Savings of Hartford, Connecticut, a major savings institution, purchased in September 1972, 20,000 of the Company's Series A $6 Cumulative Convertible Preferred Shares for $2,000,000. To date, 3,900 of these Preferred Shares have been converted into TDA Common Shares. This placement further enhanced TDA's financial position. In fact, at the time of the writing of this letter, the Company's net worth has increased to $20 million. The Company plans to nominate Mr. William W. Wilcox, Senior Vice President and Treasurer of Society for Savings, for election to the Board of Directors at the next annual shareholders meeting.

Utilizing its greatly increased financial resources, TDA expects to continue its growth through further investments and acquisitions when opportunities arise.

TDA Operations

Building and Hardware Group

During fiscal 1972, two divisions were added to The Westco Corporation, our New England building and hardware supply subsidiary—TDA's largest operating group currently accounting for approximately 60% of total TDA revenues.

Gem Electric Supply Corp. of Boston, acquired as of November 1, 1971, managed by Paul Goldstein, added appreciably to our market position in the electrical supply business in the Boston area. Gem complements our Peerless Electric Supply operation in Somerville, Massachusetts.

Grace Plumbing Supply Co., Inc. of Worcester, Massachusetts, acquired as of June 1, 1972, managed by Henry Grace, enhances our position as a wholesale distributor of plumbing supplies in eastern Massachusetts.

As a result of these acquisitions and our internal growth, The Westco Corporation is operating at an annual sales rate of over $26,000,000.

This group's volume rose steadily during fiscal 1972 as the Company attempted to maintain and increase its market position in the New England area, but profits were adversely affected by, among other things, increased competition from discount and "direct-to-you" operations; shortages of profitable merchandise because of a strike of a leading supplier; a temporary slow pace of construction activity in certain market areas despite the nationwide boom; attempts by certain of our divisions to establish a position as a wholesale supplier to retail discount operators who have been entering markets previously served by the Company; and an increase in wholesale, discount and direct shipment business as a percentage of the group's total sales.

The goal of the building and hardware group for the coming year is to maintain its sales growth with emphasis on increased profitability. Management is optimistic that this can be accomplished because of anticipated improvement in general economic conditions in New England; concentration on the introduction of more profitable product lines; the imposition of better expense controls from the information available from our new computerized financial reporting system; and further integration of facilities and better control of inventories.

Home Furnishings Group

The Company's home furnishings group was substantially expanded during the past fiscal year by the acquisition of Cooper Distributors, Inc. and Affiliated Companies, a major wholesale distributor of carpet and floor tile in Florida and South Georgia, with warehouses in Orlando, Miami and Jacksonville. Cooper's sales and profits under the overall direction of Jay Cooper and the managers of the individual branches, Gary Rovin, Maurice Pulliam and Willis Holtin, are expected to continue to increase rapidly because of the tremendous growth occurring in the Florida market.

The manufacturing portion of TDA's home furnishings group is presently recovering from a difficult year in fiscal 1972. Although it was able to improve its sales performance in 1972, increased manufacturing and operating costs lowered profitability. TDA management is addressing itself toward solving this problem by placing greater emphasis on sales of higher profit margin items, upgrading product packaging and design, and seeking new markets.

Leisure Time Facilities

The Company's leisure time facilities continue to show growth, but this was offset last year by increased operating costs. These costs could not be passed along in higher prices because of increased competition. Management plans to make certain capital improvements in our resort operation, including the addition of a night club and related facilities, with a view toward improving the competitive position and profitability of this operation.

The Midtown Tennis Club facility is expected to show better profit as a result of increased bookings and the continually increasing popularity of the sport.

Economy Enterprises Division

Last fiscal year, TDA was pleased to add the Economy Enterprises Division, under the excellent management team of Fred and Jack Cohen. Although the basic business of Economy has been the distribution of meat and dry goods products direct to the home consumer, the Division has recently established retail operations on Long Island for the distribution of appliances and floor coverings. These new operations have gotten off to a good start.

The new Economy Enterprises Division, (the home services group) accounted for, on a pro forma basis, approximately 13% of TDA's sales in fiscal 1972.

The following is a summary of companies acquired during fiscal 1972:

Name	Date Acquired (as of)	Business
Economy Food Services, Inc. and Affiliated Companies	7/1/71	Distributor of appliances, floor covering and food.
Cooper Distributors, Inc. and Affiliated Companies	11/1/71	Distributor of carpet and tile.
Gem Electric Supply Corp.	11/1/71	Distributor of electrical supplies.
Grace Plumbing Supply Co., Inc.	6/1/72	Distributor of plumbing supplies.

New Developments

On November 17, 1972, TDA signed a definitive agreement to acquire Eagle Roofing and Art Metal Works of Tampa, Florida, in an all cash transaction. Eagle's sales for its fiscal year ended February 1972 were $7.3 million and after tax earnings were $234,000.

Eagle, a 64 year old wholesale distributor of roofing supplies and sheet metal utilized by the construction industry, operates from an 80,000 square foot combination office and warehouse facility located on a full square block of about 140,000 square feet in Tampa.

The Eagle acquisition, although subject to certain preconditions, is expected to be consummated by the end of February 1973, and if consummated, will substantially increase TDA's sales and earnings in the rapidly expanding Florida market.

As mentioned above, last year TDA acquired Cooper Distributors, Inc and Affiliated Companies, which operate in Orlando, Miami and Jacksonville. Cooper recently moved to a new 25,000 square foot warehouse in Orlando, only 80 miles from the 80,000 square foot Eagle facility. Future plans may provide for Cooper to establish its own facility in Tampa.

Management is very enthusiastic about the growth prospects for Tampa and the areas surrounding the new Walt Disney World. Tampa's growth has been accelerated by the completion of the $80,000,000 Tampa International Airport in April 1971 and the opening of Walt Disney World in October 1971. Walt Disney World is about 60 miles from Tampa and approximately 20 miles from Orlando. It has already had over 10,000,000 visitors and has made a significant impact on tourist related and service industries within the Company's marketing areas. Since January 1, 1972, over 700 new motel rooms have been completed and some 1,400 are presently under construction in Tampa and surrounding localities. Tampa's temperate climate and industrial growth have continued to attract new residents. For the 12 months ended August 31, 1972, residential construction was up 15% over the comparable 1971 period with 4,200 single family and 5,000 multiple dwelling units completed.

TDA hopes to gain maximum exposure and market penetration for its products in the areas surrounding the new Walt Disney World complex which is located between Orlando and Tampa, as well as on the east and west coasts of Florida.

In connection with the signing of the agreement for the purchase of Eagle, TDA obtained the services of Mr. Robert Noojin, formerly Eastern Regional Sales Manager—Building Materials, of GAF Corporation, a major roofing material manufacturer. GAF has the only roofing material manufacturing plant of its kind in the state of Florida, and will continue to be a large supplier of products sold by Eagle. Mr. Noojin will be responsible for implementing a strong new sales program for Eagle.

TDA has recently added to its internal accounting staff in order to meet the expanded responsibilities of implementing a newly installed computerized management information, reporting and control system, toward which the Company has devoted a major effort during the past year. The system became necessary as the result of the rapid growth of TDA and management believes that in the future it will provide an excellent instrument for aiding and assessing the growth and profitability of the Company.

TDA's Future

TDA has spent the last three years building a strong financial and operating base in New England and the New York area. The thirteen companies acquired have long been established and successful and should continue to grow. In New England, TDA is a major factor in the distribution of plumbing, heating, hardware and electrical supplies. The largest part of the operations in the New York area is the Economy Enterprises Division which is showing excellent growth and profit.

Your Company intends to utilize this substantial operating and financial strength to continue its expansion in the lucrative Florida market. We are extremely optimistic about this market because of its growth in population, disposable income, residential and commercial construction, retail sales and total consumption of goods and services.

As TDA is primarily a distributor of building supplies and home furnishings, Florida offers the best market in the Country. In the first half of 1972, Florida added housing at a rate which would double the state-wide housing stock in eight and one-half years. Florida was the fastest growing state in the Nation in the 1960's (except for sparsely populated Nevada), but its current rate of housing growth is more than double the 1960's rate. By 1980, Florida could be the third largest state in the Nation, after California and New York. Florida is adding more housing than the entire populous Northeast region, TDA's base, comprising nine states with seven times the Florida population. Thus TDA intends to place major emphasis on future expansion in Florida.

The low price of the Company's common shares, which is substantially lower than the book value per share at the current time, is a limiting factor with regard to the effective cost of any capital the Company may have to raise in the future. The Company nevertheless expects to be able to continue to support its growth primarily by using internally generated cash and cash reserves and debt capacity.

Summary

All of TDA's operations are profitable, as in prior fiscal years, and are showing good growth in revenues. However, as we pointed out, management is concentrating its efforts on improving the Company's profitability in all areas and expects to make progress.

TDA intends to continue to seek profitable investments in internal growth opportunities and by acquisition. In addition, the Company will continue to seek improvement to its financial condition. Management hopes that gains in sales and net profit will result in an increase in earnings per common share.

We express our sincere appreciation for the support that TDA Industries, Inc. has received from its shareholders, customers, employees and friends who have been responsible for the growth of the Company to date.

Respectfully submitted,

Douglas P. Fields

Douglas P. Fields
Chairman of the Board
and President

January 2, 1973

TDA INDUSTRIES, INC. AND SUBSIDIARIES

CONSOLIDATED BALANCE SHEET

June 30, 1972 and 1971

ASSETS

	1972	1971
Current Assets		
Cash (Includes certificates of deposit—$1,000,000 in 1972)	$ 2,122,827	$ 1,159,490
Marketable securities (Note 1)	159,623	181,840
Accounts and notes receivable (Net of allowance for doubtful accounts—1972—$354,954; 1971—$215,258)	6,159,570	4,307,906
Inventories (Note 1)	8,434,344	5,790,725
Prepaid expenses	245,765	331,778
Total current assets	17,122,129	11,771,739
Property, Plant and Equipment—at Cost		
Partially pledged (Net of accumulated depreciation and amortization) (Notes 1, 2 and 4)	5,086,142	3,519,996
Excess of Cost of Investments over Net Assets Acquired (Note 1)	5,754,070	2,065,973
Other Assets (Notes 1 and 3)	1,224,149	1,323,949
	$29,186,490	$18,681,657

LIABILITIES

	1972	1971
Current Liabilities		
Current portion of long-term debt (Note 4)	$ 147,917	$ 133,698
Accounts payable	4,259,102	2,899,411
Federal and State income taxes (Note 6)	587,096	732,239
Accrued expenses and other current liabilities	610,196	444,854
Total current liabilities	5,604,311	4,210,202
Long-Term Debt (Notes 4 and 9)	6,040,212	4,745,793
Deferred Income Tax (Note 6)	67,134	36,244
	11,711,657	8,992,239
Deferred Income (Note 6)	58,594	42,358
Commitments and Contingencies (Notes 1, 4, 5 and 9)		

SHAREHOLDERS' EQUITY (Notes 1, 7, 8 and 9)

	1972	1971
Convertible Preferred Shares— $1 par value Authorized and unissued—1,000,000 shares	—	—
Common Shares— $.10 par value Authorized —10,000,000 shares Issued—1972— 4,022,757 shares —1971— 2,452,171 shares	402,276	245,217
Additional Paid-In Capital	13,947,022	7,436,079
Retained Earnings	3,066,941	2,000,764
	17,416,239	9,682,060
Unamortized Deferred Compensation—Paid In Stock	—	(35,000)
	17,416,239	9,647,060
	$29,186,490	$18,681,657

See accompanying notes to financial statements.

TDA INDUSTRIES, INC. AND SUBSIDIARIES

CONSOLIDATED STATEMENT OF INCOME

Two Years Ended June 30, 1972

	1972	1971
Net Sales	$38,636,360	$20,045,253
Cost of Goods Sold	28,646,318	13,736,219
Gross Profit on Sales	9,990,042	6,309,034
Operating Expense	7,869,166	4,465,486
Operating Income	2,120,876	1,843,548
Other (Expense) Income—		
Interest—Net	(417,341)	(347,661)
Sundry	82,903	65,777
	(334,438)	(281,884)
Income Before Provision for Federal Income Tax	1,786,438	1,561,664
Provision for Federal income tax (Note 6)	863,128	751,239
Income Before Extraordinary Items	923,310	810,425
Loss on investments, net of applicable income taxes—1972—$90,100; 1971—$26,500 (Notes 1 and 6)	(210,946)	(61,826)
Loss on sale of subsidiary, adjusted for applicable income taxes—1972—$37,900; 1971—$11,000 (Notes 6 and 7)	(88,645)	(11,000)
Gain on sale of real property, net of applicable income taxes—$13,300	—	35,071
Tax benefit arising from operating loss carryovers (Note 6)	464,531	109,076
	164,940	71,321
Net Income (Note 1)	$ 1,088,250	$ 881,746
Earnings Per Common Share and Common Equivalent Share (Note 1):		
Income before extraordinary items	$.25	$.36
Extraordinary items	.05	.04
Net income	$.30	$.40
Earnings Per Common Share Assuming Full Dilution (Note 1):		
Income before extraordinary items	$.25	$.35
Extraordinary items	.05	.03
Net income	$.30	$.38

See accompanying notes to financial statements.

TDA INDUSTRIES, INC. AND SUBSIDIARIES

CONSOLIDATED STATEMENT OF RETAINED EARNINGS

Two Years Ended June 30, 1972

	1972	1971
Balance—Beginning of Year	$ 2,000,764	$ 1,140,368
Net income for the year	1,088,250	881,746
Cancellation of treasury shares	(22,073)	(21,350)
Balance—End of Year	$ 3,066,941	$ 2,000,764

CONSOLIDATED STATEMENT OF ADDITIONAL PAID-IN CAPITAL

Two Years Ended June 30, 1972

	1972	1971
Balance—Beginning of Year	$ 7,436,079	$ 3,575,229
Excess of net proceeds over par value of Common Shares arising from public and private issues, conversion and retirement of debt, investments in and acquisitions of subsidiaries, net of related costs and conversions of no par shares to par value	6,510,943	3,860,850
Balance—End of Year	$13,947,022	$ 7,436,079

See accompanying notes to financial statements.

TDA INDUSTRIES, INC. AND SUBSIDIARIES

CONSOLIDATED STATEMENT OF CHANGES IN FINANCIAL POSITION

Two Years Ended June 30, 1972

	1972	1971
Sources of Working Capital		
From operations—		
Income for the year before extraordinary items	$ 923,310	$ 810,425
Items not requiring outlay of working capital—		
Depreciation and amortization of property, plant and equipment	285,290	174,933
Amortization of—		
Imputed interest and deferred financing costs	45,931	84,500
Intangibles	62,331	—
Deferred compensation	35,000	35,000
Working capital provided from operations, exclusive of extraordinary items	1,351,862	1,104,858
Extraordinary items—		
Loss on investments, net of applicable income taxes	(210,946)	(61,826)
Loss on sale of subsidiary, adjusted for applicable income taxes	(88,645)	(11,000)
Gain on sale of real property, net of applicable income taxes	—	35,071
Tax benefit arising from operating loss carryovers	464,531	109,076
Working capital provided from operations	1,516,802	1,176,179
Increase in long-term debt—Net of refinancing of current debt (1971—$1,588,575)	5,319,525	1,306,979
Common Shares issued in conjunction with public offering, private placements, companies purchased, investments, conversion and retirement of debt and settlement of indebtedness, net of related expenses	6,868,150	3,953,263
Decrease in investments—Net	260,023	—
Increase in deferred credits	47,126	—
Miscellaneous	52,043	48,955
	14,063,669	6,485,376
Uses of Working Capital		
Excess of cost of businesses purchased over book value of the net assets acquired (including cost of acquisition—1972—$628,070)	3,750,428	42,250
Net purchases of property, plant and equipment (including net property of businesses purchased—1972—$1,014,419; 1971—$1,487,484)	1,851,436	1,806,740
Reduction in long-term debt	4,025,106	600,000
Increase in long-term notes receivable	275,109	—
Increase in deferred charges	144,256	182,823
Increase in investments—Net	—	48,463
Miscellaneous	61,053	111,381
	10,107,388	2,791,657
Net Increase in Working Capital	$ 3,956,281	$ 3,693,719
Changes in Elements of Working Capital		
Increase (Decrease)		
Current assets—		
Cash	$ 963,337	$ 214,740
Marketable securities	(22,217)	(156,335)
Accounts and notes receivable—Net	1,851,664	1,140,576
Inventories	2,643,619	2,226,193
Prepaid expenses	(86,013)	142,916
	5,350,390	3,568,090
Current liabilities—		
Notes payable	—	(922,972)
Current portion of long-term debt	14,219	(461,946)
Accounts payable	1,359,691	953,211
Federal and State income taxes	(145,143)	159,819
Accrued expenses and other current liabilities	165,342	146,259
	1,394,109	(125,629)
Net Increase in Working Capital	$ 3,956,281	$ 3,693,719

See accompanying notes to financial statements.

TDA INDUSTRIES, INC. AND SUBSIDIARIES

NOTES TO THE FINANCIAL STATEMENTS

1. Principles of Statement Presentation

The accounting principles that affect the significant elements of the Company's financial statements are summarized below. They have been followed on a basis consistent with 1971.

Principles of Consolidation

The accompanying consolidated financial statements include the accounts of the Company and its wholly-owned subsidiaries. All significant inter-company accounts and transactions have been eliminated in consolidation. ([illegible])

The excess of cost over the net assets of companies acquired prior to October 31, 1970 is not being amortized as management believes that there has been no diminution of value of the acquired businesses. This value will be reviewed on a periodic basis and an amortization program will be established if future events make such amortization appropriate. The excess of such cost applicable to acquisitions subsequent to October 31, 1970 is being amortized in accordance with Opinion No. 17 of the Accounting Principles Board.

Affiliated Companies

The Company's investments in the less than 50% owned companies (Majestic Creations, Inc. and Westcalind Corp.) are carried at cost, adjusted to underlying book value. At June 30, 1972 the Company evaluated its investments and determined that a permanent decline in value had occurred. Accordingly, these investments were adjusted by $210,946 ($301,046, net of applicable income taxes of $90,100), which amount is included as an extraordinary charge for the year ended June 30, 1972.

The Accounting Principles Board has issued Opinion No. 18, "The Equity Method of Accounting for Investments in Common Stock", which requires an investor in common stock (20% and over) of another corporation to recognize its share of equity interest in its investment. The Company will be required to account for its investments under the equity method no later than the fiscal year to end June 30, 1973. In addition, this Opinion also requires retroactive adjustments conforming all periods then being reported on to reflect the equity method of accounting for such investments.

The Company's investment in Majestic Creations, Inc. (Majestic) represents 35% ownership. However, in November 1970 Majestic filed a petition for reorganization under Chapter XI of the Federal Bankruptcy Law and the final determination of this investment cannot be made at the present time. In addition, the Company is plaintiff in a legal proceeding seeking damages with respect to the merger of Majestic and is a party-defendant with respect to certain legal proceedings seeking collection from the Company on an alleged guarantee incurred in connection with that merger. Counsel to the Company have advised that, in their opinion, the Company has a valid and meritorious defense to the various claims asserted against it.

As of June 25, 1970 through June 30, 1972 the Company acquired 328,907 common shares of Westcalind Corp., representing an approximate 35% equity, in exchange for 164,439 of the Company's Common Shares and 164,439 warrants, exercisable for five years at $5 per share for the first three years and $7 for the subsequent two years. In addition, the Company and its designees have obtained irrevocable proxies which expire in August 1977 with respect to 181,433 common shares of Westcalind Corp. On April 28, 1972 the Company entered into an agreement which granted to third parties a 10 year option to purchase 278,907 of such owned shares at the Company's carrying value which would reflect all adjustments through December 31, 1973. This agreement also provides that the Company grant to the third parties its voting rights relating to 231,433 shares of stock.

The Company, together with Westcalind Corp., are co-defendants in certain legal proceedings seeking damages alleging certain violations under the Securities Exchange Act of 1934. In the opinion of counsel to the Company, these claims are without merit.

For the year ended June 30, 1972 Westcalind Corp. reported income from continuing operations of $113,015. However, this amount was offset by a loss from discontinued operations of $333,375 and a net extraordinary loss of $266,082. When TDA Industries, Inc. applies the equity method of accounting for this investment, results of operations for the year ended June 30, 1972 will be restated as follows:

	As Reported	Application of Equity Method of Accounting (Westcalind Corp.)	As Restated
Income From Continuing Operations Before Extraordinary Items	$ 923,310	$ 38,908	$962,218
Share of Loss of Discontinued Operations	—	(114,773)	(114,773)
Income(Loss) Before Extraordinary Items	923,310	(75,865)	847,445
Extraordinary Items	164,940	(91,604)	73,336
Net Income (Loss)	$1,088,250	($167,469)	$920,781

TDA INDUSTRIES, INC. AND SUBSIDIARIES

NOTES TO THE FINANCIAL STATEMENTS (Continued)

1. Principles of Statement Presentation (Continued)

Affiliated Companies (Continued)

	As Reported	Application of Equity Method of Accounting (Westcalind Corp.)	As Restated
Earnings Per Common Share and Common Equivalent Share—			
Income from continuing operations before extraordinary items	$.25	$.01	$.26
Share of loss of discontinued operations	—	(.03)	(.03)
Income (loss) before extraordinary items	.25	(.02)	.23
Extraordinary items	.05	(.03)	.02
Net income (loss)	$.30	($.05)	$.25

Earnings per common share assuming full dilution are identical with the above amounts.

Accounting for Acquisitions

During the two years ended June 30, 1972 the Company acquired various corporations in exchange for $1,180,000 in cash and 1,159,581 Common Shares of the Company. In addition to the purchase price paid, the Company has also, in certain instances, committed itself to pay additional shares, cash or notes to the former owners of the acquired companies pursuant to earnings and price guarantee formulae contained in the various acquisition agreements. Through June 30, 1972 the Company has issued approximately 198,000 Common Shares and an indeterminate number of shares may be issued pursuant to the various earnings and price guarantee formulae.

The following acquisitions have been recorded under the purchase method of accounting and the operations of these entities have been included in the consolidated financial statements since the effective dates of their acquisition.

		Aggregate Purchase Price		
			Common Shares	
Company	Effective Date of Acquisition for Accounting Purposes	Cash	Number of Shares	Value of Shares Issued for Accounting Purposes
Middlesex Supply, Inc.	Jan. 1, 1971	—	50,000	$ 66,000
Samuel Hurwitz Co.	Apr. 1, 1971	—	220,000	1,980,000(A)
Economy Food Services, Inc. and Affiliated Companies	July 1, 1971	—	387,290	1,750,000(B)
Cooper Distributors, Inc. and Affiliated Companies	Nov. 1, 1971	—	502,291	3,013,750(B)
Gem Electric Supply Corp.	Nov. 1, 1971	$ 780,000	—	—
Grace Plumbing Supply Co., Inc.	June 1, 1972	400,000	—	—
		$1,180,000	1,159,581	$6,809,750

(A) These Common Shares have a guaranteed realization of $1,980,000 and are collateralized by all the assets, business and properties of Samuel Hurwitz Co. as in existence prior to the merger. The Company, at its option, may issue additional Common Shares or promissory notes to satisfy any deficiency. It is the Company's intention to issue notes in payment thereof.

(B) The agreements relating to the acquisitions provide for the payment of additional consideration if future profits exceed certain levels and/or if proceeds from the sale of initial Common Shares (as defined in agreements) are below certain specified amounts.

Supplemental Pro Forma Information

Pro forma results of operations for the years ended June 30, 1972 and 1971, assuming that all acquisitions had taken place on July 1, 1970, are as follows:

	Year Ended June 30,	
	1972	1971
Net Sales	$43,546,139	$35,989,964
Income Before Extraordinary Items	$ 1,096,754	$ 1,281,304
Net Income	$ 1,261,694	$ 1,352,625
Earnings Per Common Share—		
Income before extraordinary items	$.28	$.37
Net Income	$.32	$.40

TDA INDUSTRIES, INC. AND SUBSIDIARIES

NOTES TO THE FINANCIAL STATEMENTS (Continued)

1. Principles of Statement Presentation (Continued)

Marketable Securities

These securities are valued at cost, which approximates market value.

Inventory Valuation

Inventories are valued at lower of cost (first-in, first-out or average cost methods) or market.

Property, Plant and Equipment

Items capitalized as part of property, plant and equipment, including significant betterments to existing facilities, are valued at cost.

The general policy of the Company is to relieve the asset and the accumulated depreciation relative to such assets, retired or otherwise disposed of, the resulting profit or loss being included in income in the year of disposition.

Maintenance and Repairs

These costs are expensed as incurred. Renewals and replacements of a routine nature are charged to income while those which improve or extend the estimated useful life of existing properties are capitalized.

Depreciation and Amortization Policies

Depreciation and amortization of property, plant and equipment are provided on the straight-line method at various rates calculated to extinguish the book values of the respective items over their estimated useful lives.

Earnings Per Share

Earnings per common share and common equivalent share are based on the weighted average number of common shares and common equivalent shares outstanding during each year. The assumed exercise of certain stock options, warrants and potential common shares issuable pursuant to price guarantee formulae have been considered common equivalent shares in this computation. In addition, net income has been reduced by potential interest expense, net of tax (1972—$22,535; 1971—$5,634) based upon the differential between the guaranteed realization and the fair market value of the Company's Common Shares (payable in cash, notes or common shares) issued in connection with an acquisition.

Earnings per common share assuming full dilution reflect the shares issuable upon conversion of convertible notes to date of conversion, assumed exercise of certain stock options, warrants and the potential common shares issuable pursuant to price guarantee formulae. Accordingly, net income has been increased by interest expense applicable to the convertible notes, net of related taxes in 1971. In addition, net income has been reduced by potential interest expense, net of tax (1972—$22,535; 1971—$5,634) based upon the differential between the guaranteed realization and the fair market value of the Company's Common Shares (payable in cash, notes or common shares) issued in connection with an acquisition.

2. Property, Plant and Equipment

The major classes of property, plant and equipment are as follows:

	June 30,	
	1972	1971
Land	$ 972,797	$ 972,797
Buildings and improvements	2,308,120	2,038,502
Furniture; fixtures and equipment (including dies and molds)	1,359,067	1,098,528
Automotive equipment	276,818	122,038
Leasehold improvements	552,829	107,830
Leasehold rights acquired	427,834	—
Livestock	21,559	21,361
	5,919,024	4,361,056
Less: Accumulated depreciation and amortization	832,882	841,060
	$5,086,142	$3,519,996

Depreciation and amortization have been computed substantially on the straight-line method as follows:

Buildings and improvements	5 to 50 years
Furniture, fixtures and equipment (including dies and molds)	3 to 20 years
Automotive equipment	2 to 7 years
Leasehold improvements	Lesser of useful estimated life or remaining term of lease
Leasehold rights acquired	16 to 40 years
Livestock	7 to 10 years

TDA INDUSTRIES, INC. AND SUBSIDIARIES

NOTES TO THE FINANCIAL STATEMENTS (Continued)

3. Other Assets

These consist of:

	June 30, 1972	June 30, 1971
Investments (Note 1)—		
Westcalind Corp.	$ 491,632	$ 688,193
Majestic Creations, Inc.	30,000	93,462
Deferred imputed interest (interest payable at 4% per annum—imputed at 8% for financial statement purposes)	—	129,580
Deferred registration costs	42,826	127,703
Deferred merger and acquisition costs	—	114,829
Security deposits	58,165	34,004
Notes receivable	320,109	—
Deferred financing costs	242,282	—
Other	39,135	136,178
	$1,224,149	$1,323,949

4. Long-Term Debt

This debt consists of the following:

	June 30, 1972	June 30, 1971
9.4% 15 year uncollateralized note—The Prudential Insurance Company of America(A)	$5,000,000	—
4% notes (imputed at 8% for financial statement purposes), payable to former shareholders of Maine Hardware and Plumbing Supply Co. and Affiliates, Peerless Electric Supply Co., payable in installments through April and July 1973, respectively, collateralized by the stock of the respective entities	—	$1,977,591
5 1/4-8 1/2% real estate mortgages with varying maturities, payable in installments through 1991	1,086,591	825,114
6-7% uncollateralized bank notes with varying maturities through January 1973	—	998,650
Sundry other long-term indebtedness—Partially subject to various chattel mortgages	101,538	378,136
7 1/2% bank note—Collateralized by accounts receivable and inventory of The Westco Corporation, payable in installments through 1976	—	700,000
	6,188,129	4,879,491
Less: Current portion of long-term debt	147,917	133,698
	$6,040,212	$4,745,793

(A) On June 29, 1972 the Company refinanced a $4,000,000 loan, borrowed an additional $1,000,000 and committed to borrow an additional $1,000,000 from The Prudential Insurance Company of America in the form of a 15 year uncollateralized note bearing interest at 9.4%. (See Note 9). Quarterly payments of $100,000 commence June 1, 1974 with an $800,000 payment due at maturity, June 1, 1987. The agreement provides, among other things, for the maintenance of certain levels of consolidated working capital, maximums on current debt and restricts long-term debt. In addition, the agreement contains restrictions on (1) the payment in cash of dividends and the acquisition by the Company of its common shares and (2) the payment in cash of contingencies in conjunction with certain acquisitions. At June 30, 1972 approximately $280,000 and $920,000, respectively, are free from such restrictions.

The provisions of the original agreement required that a portion of the proceeds be applied to the retirement of certain outstanding debt. (At June 30, 1971, $1,588,575 of current maturities of long-term debt and other current debt were reclassified to long-term debt for financial statement purposes.)

4. Long-Term Debt (Continued)

The approximate aggregate maturities of long-term debt during the five years to end June 30, 1977 are as follows:

June 30,	
1973	$147,917
1974	216,246
1975	509,259
1976	490,064
1977	469,640

5. Commitments and Contingencies

The Company and its subsidiaries have entered into various employment contracts for periods of one to five years commencing in 1969. Some of these contracts have renewal options for five years and, in some instances, five additional years thereafter. Pursuant to such agreements the annual amounts payable are approximately $960,000.

The Company is guarantor on two employment contracts arising from its investment in Westcalind Corp. The maximum amounts payable under these contracts are $140,000 per annum. One contract expires in March 1976 and the other in May 1978. The latter contract is renewable at the option of the employee for an additional seven year term.

At June 30, 1972 the Company and its subsidiaries were liable under various long-term leases, with expirations through 1992, of property and equipment which provide for minimum annual rentals of approximately $410,000 in the current year and increased rentals in future years, as follows:

Fiscal Years Ending In	Approximate Annual Rentals During These Periods
1973	$418,000
1974	397,000
1975	389,000
1976-1980	352,000
1981-1985	189,000

Annual rentals from 1986 through 1992 are immaterial.

See Note 4 for loan commitment.

Several subsidiaries of the Company had either profit-sharing or pension plans for the benefit of substantially all employees. The Company's policy was to fund pension costs as incurred. At December 31, 1971 the Company terminated certain of these plans and consolidated those terminated into one new profit-sharing plan. This plan allows for discretionary contributions. The Company has not authorized any contribution for the period January 1, 1972 to June 30, 1972 under the new plan. Payments under the terminated plans were as follows:

June 30,	
1972	$64,884
1971	65,358

Contributions to those plans which were not terminated and remain in existence are deemed to be immaterial.

See Notes 1, 7 and 8 for the Company's obligations to issue additional Common Shares, cash or promissory notes for maintenance of the market value of the Company's Common Shares.

See Note 1 for pending litigation concerning the Company.

At June 30, 1972 the Company was contingently liable for discounted notes receivable in the amount of approximately $340,000.

TDA INDUSTRIES, INC. AND SUBSIDIARIES

NOTES TO THE FINANCIAL STATEMENTS (Continued)

6. Federal Income Taxes

The Company and its subsidiaries file separate tax returns.

The accompanying financial statements give effect to:

1. Comprehensive income tax allocations—

   Deferred taxes relating to the following items have been reflected in the consolidated financial statements:

   Cash basis
   Depreciation

2. The accrual of tax benefits—

   Tax benefits are applicable to capital losses sustained on investments within the period. The Company has definite plans to dispose of certain assets which will provide capital gains in excess of these losses.

At January 1, 1971 Middlesex Supply, Inc., which was merged into a subsidiary of the Company, had an adjusted net operating loss carryforward of approximately $1,600,000. Although subject to final determination by the Internal Revenue Service, it is the opinion of counsel to the Company that this net operating loss carryforward is available to the Company as a reduction of its Federal income tax liability. The Federal income tax benefits from the utilization of approximately $1,300,000 of this net operating loss carryover for 1972 and 1971 of $464,531 and $109,076, respectively, (net of $66,924 in 1971 applicable to the reduction of noncurrent assets for deferred credit computation purposes) have been credited to income as an extraordinary item.

The Federal income tax returns of TDA Industries, Inc. have not been examined by the Internal Revenue Service. The returns of the subsidiaries have been examined for various periods and have resulted in immaterial assessments.

7. Common Shares

A summary of the changes in the Common Share account is as follows:

	Shares	
	1972	1971
Balance—Beginning of year	2,452,171	1,646,540
Issued in connection with—		
Subsidiary acquisitions and investments	1,019,979	310,500
Public offering	—	282,285
Conversion of debt	—	120,000
Private placements	266,084	34,029
Price guarantees—Acquisitions	198,023	32,823
Cancellation of indebtedness	41,000	23,000
Sale of a subsidiary (A)	50,000	—
Other	(4,500)	2,994
Balance—End of year	4,022,757	2,452,171

(A) During 1972 the Company amended an agreement of sale of a subsidiary to provide for the issuance of 50,000 of the Company's Common Shares. For the year ended June 30, 1972 this has resulted in an additional loss from the sale of a subsidiary of $88,645 (adjusted for applicable income taxes of $37,900) which has been charged to income as an extraordinary item.

TDA INDUSTRIES, INC. AND SUBSIDIARIES
NOTES TO THE FINANCIAL STATEMENTS (Continued)

7. Common Shares (Continued)

Information with respect to Common Shares reserved for future issuance at June 30, 1972 is as follows:

	Shares
Exercise of options granted and which may be granted under the qualified stock option plan	250,000
Exercise of stock purchase warrants and options outstanding	239,535
Contingently issuable as additional consideration for businesses acquired, based upon future earnings and market price of the Company's Common Shares	138,471*
	628,006

---

* In addition, an undeterminable number of Common Shares are contingently issuable pursuant to certain acquisition and private placement agreements relating to future earnings and market price of the Company's Common Shares.

8. Stock Options

On May 6, 1968 the Company's shareholders approved a qualified stock option plan. The plan, as amended in June 1969 and January 1972, reserves for issuance 250,000 of the Company's Common Shares, $.10 par value, to officers and key employees at prices not lower than fair market value at dates options are granted.

Options are exercisable in accordance with terms fixed by the Board of Directors and are generally exercisable up to 25% each year, but in all cases expire five years from date of grant. Under the plan, no options may be granted after May 5, 1978.

Information with respect to the plan is as follows:

	Number of Shares	Range of Option Price Per Share
Shares under option at June 30,		
1972	50,500	$5.25-$10.50
1971	21,000	$5.69-$10.50

At June 30, 1972 and 1971, respectively, there were 9,750 and 4,750 options exercisable. No options have been exercised since inception of the plan. At June 30, 1972, 250,000 of the Company's Common Shares were reserved for the future exercise of options granted and which may be granted.

The Company makes no charge to income in connection with the granting of options.

9. Post Balance Sheet Events

On September 25, 1972 the Company designated 20,000 of its Convertible Preferred Shares as Series A $6 Cumulative Convertible Preferred Shares and issued them for a purchase price of $2,000,000 in cash. At any time after January 1, 1974 the Company may redeem the Series A Preferred Shares at $120 per share at the rate of 7,500 shares per year. Upon liquidation each Series A Preferred Share is entitled to a $100 liquidation distribution prior to any liquidation distribution on subordinated securities. Each Series A Preferred Share is entitled to 10 votes and, under certain conditions, the holders of the Series A Preferred Shares, voting as a class, will be entitled to elect two Directors. The Series A Preferred Shares are convertible at the holder's option into Common Shares of the Company at the rate of 20 Common Shares for each Series A Preferred Share or the rate equal to the number of Common Shares obtained by dividing 100 by the current market price of the Company's Common Shares at the time of conversion. On December 4, 1972, 3,900 of the Series A Preferred Shares were converted into 150,180 of the Company's Common Shares.

On November 13, 1972, the Company exchanged $317,609 in principal amount of Promissory Notes of Westcalind Corp. owned by it for 317,000 common shares of Westcalind Corp. and $609. Thus, the Company owns, of record or beneficially, 645,907 common shares of Westcalind Corp., which constitutes approximately 47% ownership.

On November 17, 1972 the Company entered into an agreement to acquire all the outstanding stock of Eagle Roofing and Art Metal Works (Eagle) for $2,500,000 less an amount equal to any sums expended by Eagle for the purpose of redeeming any of Eagle's common stock and any sums distributed to the stockholders as dividends or otherwise, limited to $331,000.

On November 30, 1972 the Company exercised its commitment to borrow an additional $1,000,000 from The Prudential Insurance Company of America (see Note 4 above).

A 146

BOARD OF DIRECTORS AND SHAREHOLDERS
TDA INDUSTRIES, INC.

We have examined the consolidated balance sheet of TDA INDUSTRIES, INC. AND SUBSIDIARIES at June 30, 1972 and the related consolidated statements of income, retained earnings, additional paid-in capital and changes in financial position for the year then ended. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. We previously made a similar examination of the financial statements for the preceding year.

In our opinion these financial statements present fairly the financial position of TDA INDUSTRIES, INC. AND SUBSIDIARIES at June 30, 1972 and their results of operations and changes in financial position for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

J. K. Lasser & Company

J. K. Lasser & Company

New York, New York
October 26, 1972
(December 20, 1972 as to Note 9,
paragraphs 2, 3 and 4)

MANAGEMENT PERSONNEL

	Years of Service
TDA Industries, Inc.	
Douglas P. Fields, President	3
Frederick M. Friedman, Financial Vice President, Treasurer and Secretary	2
Gerald Gelles, Vice President	17
Edward Lampert	24
Economy Enterprises (Division)	
Jack Cohen	16
Fred Cohen	16
Northeastern Plastics (Division)	
Max Bernstein	19
Midtown Tennis Club (Division)	
Archag Kelegian	7
The Westco Corporation	
Maineco (Division)	
George E. Finberg	38
Richard I. Chase	35
Duane Decker	10
Maurice Gleckman	28
Peerless Electric (Division)	
Lawrence M. Perlis	25
Samuel Hurwitz (Division)	
Herman Dorfman	41
Joel Dorfman	8
Martin Dorfman	15
West Hartford Supply (Division)	
Alvin Wiener	15
Woburn Supply (Division)	
Martin Friedman	23
William Gray	6
Scott Hardware (Division)	
George Chouprakos	11
Gem Electric Supply (Division)	
Paul Goldstein	27
Grace Plumbing Supply (Division)	
Henry Grace	32
Cooper Distributors, Inc. (Subsidiary)	
M. B. Cooper	25
Jay Cooper	12
Willis Holton	19
Maurice Pulliam	9
Gary Rovin	4
White Lamps, Inc. (Subsidiary)	
Eugene B. White	14
Sunnycroft Ponderosa, Inc. (Subsidiary)	
Michael Schneider	8

TDA INDUSTRIES, INC.

Executive Offices:

122 East 42nd Street
New York, N.Y. 10017

Officers:

Douglas P. Fields	Chairman of the Board and President
Frederick M. Friedman	Financial Vice President, Treasurer and Secretary
Gerald Gelles	Vice President

Directors:

Douglas P. Fields
Frederick M. Friedman
Gerald Gelles
Stanley I. Feldman
Luke Sapan
Michael Scharf
John E. Smircina

General Counsel:

Davis O'Sullivan Weil & Wolff
280 Park Avenue
New York, N.Y. 10017

Auditors:

J. K. Lasser & Company, New York, N.Y.

Shares Traded:

National Over-the-Counter Market, Symbol TDAI

You will please ta
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ly entered in the
the office of the C

Dated, N. Y., ____

You

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To

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Sir:

Please take notice
will be presented
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United States Distr
the Clerk, United S
Square, Borough of
York, on the ____
10'30 o'clock in the
thereafter as counse

Dated, N. Y., ____

You

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ke notice that a ______
is a copy, was this day
within entitled action,
Clerk of this Court.

______________, 19____

urs, etc.,

United States Attorney
Attorney for ________

Attorney for ________

---

e that the within ______
for settlement and sig-
rable ________________
ict Judge, at the office of
States Courthouse, Foley
Manhattan, City of New
day of ____, 19 ____, at
______ noon or as soon
el can be heard.

______________, 19____

urs, etc.,

United States Attorney
Attorney for ________

Attorney for ________

Form No. USA-33s-270
(Rev. 6-1-76)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

DOUGLAS P. FIELDS, et al.,

Defendants.

NOTICE OF MOTION & AFFIDAVIT

76 Cr. 1022

ROBERT B. FISKE, JR.
TEL. ~~264-3311~~ 791-1931 *United States Attorney*
Attorney for U.S.A.

Due service of a copy of the within is hereby admitted.

New York, ____________________, 19______

Attorney for

To

Attorney for

FPI-MI—6-15-76-30M-5677

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 150

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

TDA INDUSTRIES, INC.
WESTCALIND CORP.
DOUGLAS P. FIELDS
FREDERICK M. FRIEDMAN
PETER S. DAVIS
ERIC BERGE
ALAN E. SANDBERG

Defendants.

U.S. DISTRICT COURT
FILED
FEB 4 1976
S.D. of N.Y.

75 Civil 4519 (IWP)

FINAL JUDGMENT OF PERMANENT INJUNCTION AND ORDER OF ANCILLARY RELIEF AGAINST DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN AND PETER S. DAVIS

Plaintiff, Securities and Exchange Commission ("Commission"), having filed its Complaint herein on September 16, 1975, there having been no trial with respect thereto; defendants Douglas P. Fields ("Fields"), Frederick M. Friedman ("Friedman") and Peter S. Davis ("Davis") having acknowledged in the attached Consent receipt of a copy of the Summons and Complaint filed herein, having admitted the in personam jurisdiction of this Court over them and the jurisdiction of this Court over the subject matter of the action; defendants Fields, Friedman and Davis having waived entry of findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure with respect to the entry of this Final Judgment of Permanent Injunction and Order of Ancillary Relief; and defendants Fields, Friedman, and Davis, having agreed, without admitting or denying the allegations in the Commission's Complaint, to the entry of this Final Judgment of Permanent Injunction and Order of Ancillary Relief; and it further appearing that this Court has jurisdiction over the parties and the subject matter hereof, it is hereby

MICROFILM
FEB 5 1976

J.H.

I

ORDERED, ADJUDGED AND DECREED that defendants Fields, Friedman and Davis, their agents, servants, employees, attorneys, nominees, and those persons acting in concert or participation with them, and each of them, be and are hereby permanently enjoined from:

A. Directly or indirectly violating Sections 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. 77e(a) and 77e(c), by, in the absence of any applicable exemption:

(1) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, through the use or medium of any prospectus or otherwise, the common stock of TDA Industries, Inc., or any other security, unless and until a registration statement has been filed with the Commission as to such securities;

(2) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell, through the use or medium of any prospectus or otherwise, the common stock of TDA Industries, Inc., or any other security, unless and until a registration statement is in effect with the Commission as to such securities;

(3) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, the common stock of TDA Industries, Inc., or any other security, for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Commission as to such securities.

J.H.

B. Directly or indirectly violating Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the offer for sale, sale, offer to purchase or purchase of shares of the common stock of TDA Industries, Inc., Westcalind Corp., or any other security,

(1) to employ any device, scheme or artifice to defraud;

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

C. Directly or indirectly violating Section 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a), and the rules and regulations thereunder, by filing with the Commission annual and other periodic reports required to be filed with the Commission by the Securities Exchange Act of 1934 and the rules and regulations thereunder, for TDA Industries, Inc., Westcalind Corp., or any other issuer required to file such reports, containing untrue statements of material fact or omitting to state any material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, or omitting information required to be stated therein, concerning, among other things:

(1) the financial condition of the registrant;

(2) the existence of side-agreements, arrangements, or understandings, written or oral, among the registrant, its directors, officers, and affiliates; and

(3) the use of the registrant's assets for the personal benefit of directors and officers of the registrant.

D. Directly or indirectly violating Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), and Rules 14a-3 and 14a-9 thereunder, 17 C.F.R. 240.14a-3 and 240.14a-9, by using or causing to be used any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange, to solicit proxies for securities of TDA Industries, Inc., Westcalind Corp., or any other issuer registered pursuant to Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 781, by means of any proxy statement, form of proxy, notice of meeting or other communciation, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false and misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false and misleading or necessary to correct any statement in any earlier communication with respect to the future solicitation of a proxy for the same meeting or subject matter which has become false or misleading, or by failing to include in proxy statements for securities of TDA Industries, Inc., Westcalind Corp., or any other issuer registered pursuant to Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 781, any information required by Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), and the rules and regulations thereunder,

J.B.

including, but not limited to, the material direct or indirect economic benefit received by the issuer's officers, directors, and nominees for election as director, arising out of transactions to which the issuer is or was a direct or indirect party or participant.

II

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Fields and Friedman, their agents, servants, employees, attorneys, nominees, and those persons acting in concert or participation with them, and each of them, be and are hereby permanently enjoined from directly or indirectly violating Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(a), and Rule 16a-1 thereunder, 17 C.F.R. 240.16a-1, by failing to file initial statements of, or required statements of changes in, beneficial ownership of the common stock of TDA Industries, Inc., or of any other issuer, while and at a time that said defendants are directly or indirectly the beneficial owners of more than 10% of any class of any equity security (other than an exempted security) which is registered pursuant to Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 781, or are directors or officers of the issuer of such security.

III

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Fields and Friedman, and each of them, shall be prohibited from, directly or indirectly, assuming a position as, or continuing to act as, directors of TDA Industries, Inc. and Westcalind Corp. for a period of two (2) years from the date of entry of this Judgment and Order.

J.H.

IV

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Fields and Friedman, and each of them, shall be prohibited from, directly or indirectly, voting the securities of TDA Industries, Inc. and Westcalind Corp. which said defendants may own or exercise control over for a period of two (2) years from the date of entry of this Judgment and Order.

V

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, with respect to the transactions alleged at paragraphs 13 through 16 of the Commission's Complaint (hereinafter referred to as "Transaction I"), defendants Fields and Friedman shall, jointly and severally, pay to Westcalind Corp. the sum of $50,000; and, with respect to the transactions alleged at paragraphs 17 through 30 of the Commission's Complaint (hereinafter referred to as "Transaction II"), defendants Fields, Friedman and Davis shall pay to TDA Industries, Inc. the sum of $435,000, of which each defendant shall only be liable for one-third of said sum; and, with respect to the transactions alleged at paragraphs 31 through 36 of the Commission's Complaint (hereinafter referred to as "Transaction III"), defendants Fields and Friedman shall, jointly and severally, pay to TDA Industries, Inc. the sum of $100,000. With respect to Transaction III, if defendant Alan E. Sandberg ("Sandberg") shall return 28,000 shares of TDA Industries, Inc. common stock to TDA Industries, Inc., the sum of $70,000 shall be credited against the sum of $100,000 due and owing by defendants Fields and Friedman under this Part of the Judgment and Order. Further, if the defendant Sandberg or any other person (other than defendants Fields, Friedman and

Davis shall pay to TDA Industries, Inc. and Westcalind Corp. any sums of money received in connection with Transactions I, II and III, said sum shall be credited against any amount due and owing by defendants Fields, Friedman or Davis under this Part of the Judgment and Order; provided, however, that in no event shall there be any credit against any amount due and owing by defendants Fields, Friedman or Davis under this Part of the Judgment and Order, unless TDA Industries, Inc. and Westcalind Corp. shall have received said sums of money in cash within thirty (30) months after the entry of this Judgment and Order. Further, with respect to Transaction II, defendants Fields, Friedman and Davis shall be credited with the sum of $72,250, representing monies previously paid to TDA Industries, Inc. by said defendants, thereby leaving a balance of $362,750 to be paid by said defendants to TDA Industries, Inc. with respect to Transaction II, to wit, $120,916.67 each.

VI

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Fields, Friedman and Davis shall pay to TDA Industries, Inc. and Westcalind Corp. the aforesaid sums of money referred to in Part V of this Judgment and Order as follows:

A. Defendants Fields and Friedman shall each pay $60,000 on or before January 2, 1977 and defendant Davis shall pay $60,000 within eighteen (18) months after the entry of this Judgment and Order. All sums of money paid by defendants Fields and Friedman pursuant to this Part of the Judgment and Order shall be deemed to be applied to Transactions I, II and III on a pro-rata basis.

J. D.

the remaining sum due and owing under Part V of this Judgment and Order within thirty (30) months after the entry of this Judgment and Order.

VII

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, within thirty (30) days after the entry of this Judgment and Order, defendants Fields, Friedman and Davis shall secure a bond, or other collateral satisfactory to the Commission, which guarantees the performance of said defendants' obligation to pay to TDA Industries, Inc. and Westcalind Corp. the aforesaid sums of money referred to in Parts V and VI of this Judgment and Order. Upon procurement of a bond the defendants shall immediately file a copy of same with the Court and the Commission, or upon procurement of other collateral satisfactory to the Commission, the defendants shall immediately deposit same with an escrow agent satisfactory to the Commission and approved by the Court.

VIII

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction of this action to implement and carry out the terms of its decree and of all additional decrees or orders appropriate in the public interest for the protection of investors. Nothing in this Judgment and Order shall be construed as limiting or affecting the right of TDA Industries, Inc. or Westcalind Corp. to take any and all appropriate action, including the institution of legal proceedings, against defendants Fields, Friedman and Davis arising out of any of the transactions alleged in the Commission's Complaint; nor shall anything in this Judgment and Order be construed as limiting or affecting the right of TDA Industries, Inc. to take any and all appropriate action against defendants Fields, Friedman and Davis based upon certain indemnification agreements previously entered into

J.G.

between TDA Industries, Inc. and said defendants. Further, nothing in this Judgment and Order shall be construed as limiting or affecting the right of any shareholder of TDA Industries, Inc. or Westcalind Corp., or any former shareholder of such companies, to take any and all appropriate action, including the institution of legal proceedings, against defendants Fields, Friedman and Davis arising out of any of the transactions alleged in the Commission's Complaint.

And there being no just reason for delay, the Clerk of the Court is hereby directed to enter this Judgment and Order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: New York, New York
January 28 1976

/s/ L. W. Pierce
UNITED STATES DISTRICT JUDGE
MA

JUDGMENT ENTERED: 2/5/76
/s/ Raymond F. Burghardt
CLERK

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
BY Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, : 75 Civil 4519 (LWP)

-against- : CONSENT OF DEFENDANTS DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN, AND PETER S. DAVIS TO FINAL JUDGMENT OF PERMANENT INJUNCTION AND ORDER OF ANCILLARY RELIEF

TDA INDUSTRIES, INC.
WESTCALIND CORP.
DOUGLAS P. FIELDS
FREDERICK M. FRIEDMAN
PETER S. DAVIS
ERIC BERGE
ALAN E. SANDBERG

Defendants. :

---

1. Defendants Douglas P. Fields ("Fields"), Frederick M. Friedman ("Friedman"), and Peter S. Davis ("Davis") admit the in personam jurisdiction of this Court over them and the jurisdiction of this Court over the subject matter of this action, admit the service of the Summons and Complaint upon them and admit that the Complaint filed herein by the plaintiff Securities and Exchange Commission ("Commission") states claims upon which relief may be granted; and Fields, Friedman, and Davis waive the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

2. Defendants Fields, Friedman, and Davis, without admitting or denying any of the allegations in the Commission's complaint, hereby consent to the entry of the Final Judgment of Permanent Injunction and Order of Ancillary Relief in the form annexed hereto, without further notice.

3. This consent is given by defendants Fields, Friedman and Davis voluntarily and no promise or threat of any kind whatsoever has been made by plaintiff Commission or any member, officer, agent, or representative thereof to induce Fields, Friedman, and Davis to enter into this consent.

4. Defendants Fields, Friedman, and Davis agree to respond to any subpoena or notice to take deposition issued by the United States District Court for the Southern District of New York at the request of the Commission, or in the case of a notice to take deposition issued by the Commission, in connection with any aspect of this litigation, as if they were still parties to such litigation; and failure to comply with such notice or subpoena without lawful cause shall constitute contempt of Court, without waiving any of their constitutional rights.

Dated: New York, New York
Dec 10th and Dec 11th, 1975

Douglas P. Fields
DOUGLAS P. FIELDS

FREDERICK M. FRIEDMAN

Peter S. Davis
PETER S. DAVIS

APPROVED:

SHEA GOULD CLIMENKO KRAMER & CASEY

By:

SAUL S. STREIT, A Member
(Attorneys for Defendants Douglas
P. Fields, Frederick M. Friedman,
and Peter S. Davis)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On this 11th day of December, 1975, before me personally appeared Douglas ~~P.~~ Fields, ~~Frederick M. Friedman,~~ and Peter S. Davis to me known and known to me to be the persons who executed the foregoing instrument and they duly acknowledged to me that they executed same.

Anne D'Andrea
NOTARY PUBLIC

ANNE D'ANDREA
Notary Public, State of New York
No. 41-0353310 Queens County
Certificate filed in New York County
Term Expires March 30, 1977

[Excerpt from Government's Memorandum of Law in Opposition to Defendants' Motions for Dismissal, Severance, and Change of Venue]

DAC:slc
3-1796

the SEC had no authority to grant immunity from criminal prosecution.* Thus, "specific performance" of the alleged SEC promise would not, in any event, imply dismissal of the Indictment since the alleged promise carried no assurance against criminal prosecution.

See, United States v. Horton, 334 F.2d 153 (2d Cir. 1964). In that case, the defendant received consecutive sentences of 16 years imprisonment for bank robbery and 2 years for a postal violation, and then moved to vacate the sentences under 28 U.S.C. §2255. Among other things, the defendant claimed that he had been induced to plead guilty by the mistaken advice of his attorney that, if asked by the sentencing judge for a recommendation, the prosecutor would recommend a sentence of eight to ten years. Although "it was inevitable that the prosecutor would not be" asked for a recommendation, the Second Circuit allowed the sentence to stand on the ground that the defendant "knew there was no assurance that any recommendation from the prosecutor would be either sought or followed." 334 F.2d at 155.

---

* As experienced defense counsel well know, the only place where defendants could have obtained assurance that there would be no criminal prosecution would have been from the Department of Justice. It is significant that no allegation is made -- nor could one be made -- that any effort was made to obtain such a commitment from the United States Attorney or anyone else at the Department of Justice.

Similarly, in the instant case, even if the SEC had made and kept the alleged promise, the defendants knew that there was no assurance against criminal prosecution. While avoiding a specific reference of the case by the SEC might have reduced the risk of prosecution, it clearly provided no guarantee against the matter coming to the attention of the United States Attorney's Office from the District Attorney's Office, the newspapers, advance sheets, or any one of a number of other possible sources.

Secondly, defendants' argument is lacking in common sense. The dismissal of an indictment is a drastic remedy which, we submit, is plainly inappropriate in this case for three reasons. First, defendants' argument rests on the assumption that the improper behavior of an official in an agency unconnected with criminal justice should prevent the Government and the Courts from seeking to punish crimes victimizing the public. This assumption is not supported by any law in this circuit,* and is contrary to the best interests of the public.

---

* Indeed, to the contrary, in United States v. Boulier, 350 F. Supp. 165, 171 (E.D.N.Y. 1972), aff'd sub nom. United States v. Nathan, 476 F.2d 456 (2d Cir.), cert. denied, 414 U.S. 823 (1973), the District Court held that a commitment made by an Assistant United States Attorney in a different district was totally ineffective to bind the Eastern District of New York. The Second Circuit did not reach this issue. But see, United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (en banc).

[M-2] moment.

The COURT. Rather than waste time with Mr. Campbell, who may or may not come up with the answer, why not wait for Mr. Riccio?

Are you ready to go, Mr. Berger?

Mr. BERGER. Yes, I am, your Honor.

Mr. BECKLER. Your Honor, one thing I wanted to say with regard to the defendant Rodman, I am not planning to use any statements made by the Defendant Rodman in court either as to himself or as to the other defendants.

The COURT. That is what you were going to think about this morning.

Mr. BECKLER. That's right.

Mr. BERGER. Your Honor, it is the position of the defendant that the statements that he gave to the SEC and the cooperation that he gave to the SEC permeates the entire case, each and every element of the case, and almost every count, and that the indictment is the fruit of the statements he made, either directly or indirectly, and the government cannot put in any case against the Defendant Rodman without violating his constitutional rights.

The COURT. What constitutional rights?

Mr. BERGER. His right against self-incrimination.

The COURT. The right against self-incrimination

[H-3] doesn't extend to voluntary statements.

Mr. BERGER. Your Honor, the question is whether the statements were voluntary or whether there has been a promissory estoppel and whether the defendant was misled into waiving those rights. That goes to the heart of the issue.

If the defendant waives his constitutional rights due to a promise made by the government and that promise is not kept, then of course nothing that is obtained from that defendant, directly or indirectly, can be used against the defendant, and that is the issue in this case.

The COURT. On your motion to dismiss?

Mr. BERGER. Yes, your Honor.

The COURT. The motion to suppress is just blown away?

Mr. BERGER. That's right, because of the fact that the government has agreed not to use any of those statements.

The COURT. You will be held to that.

Mr. BECKLER. Yes, your Honor, I understand. I direct my statement on that to the question of the Bruton problem and the question of severance. I was not directing it toward any aspect of counsel's motions for dismissal.

[H-2] or a principal of the corporate broker-dealer. Allowed as to paragraph 3.

With respect to the motions of the defendant William Rodman to suppress evidence and to dismiss, I make the following findings of fact: that the defendant Rodman was induced to give statements to the officials of the SEC upon representations that Mr. Riccio would make a recommendation that he not be indicted; that he did make some statements of a fairly extensive nature; and that not only did Mr. Riccio not make such a recommendation, but at the time of these statements he was actively contemplating the preparation of a criminal reference report which would have included the defendant Rodman.

Now, while this does not violate any of the ordinary rules of -- Fifth Amendment rules that the man gave his statement voluntarily and does not come within any of the formal prohibitions, it does come under the general prohibition of unfair treatment of a defendant and therefore I am going to allow the defendant Rodman's motion to dismiss.

Having done that, I have no occasion to deal with the defendant Rodman's motion to suppress evidence, but I am going to allow that anyway in case some other court disagrees with me on the matter of the motion to dismiss. Both of those motions are allowed.

The motions of the defendant Smolar and the defendant Woodrow to suppress evidence are denied because the

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, : 75 Civil 4519 (LWP)

-against- :

TDA INDUSTRIES, INC.
WESTCALIND CORP.
DOUGLAS P. FIELDS
FREDERICK M. FRIEDMAN
PETER S. DAVIS
ERIC BERGE
ALAN E. SANDBERG

Defendants. :

CONSENT OF DEFENDANTS DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN, AND PETER S. DAVIS TO FINAL JUDGMENT OF PERMANENT INJUNCTION AND ORDER OF ANCILLARY RELIEF

1. Defendants Douglas P. Fields ("Fields"), Frederick M. Friedman ("Friedman"), and Peter S. Davis ("Davis") admit the in personam jurisdiction of this Court over them and the jurisdiction of this Court over the subject matter of this action, admit the service of the Summons and Complaint upon them and admit that the Complaint filed herein by the plaintiff Securities and Exchange Commission ("Commission") states claims upon which relief may be granted; and Fields, Friedman, and Davis waive the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

2. Defendants Fields, Friedman, and Davis, without admitting or denying any of the allegations in the Commission's complaint, hereby consent to the entry of the Final Judgment of Permanent Injunction and Order of Ancillary Relief in the form annexed hereto, without further notice.

3. This consent is given by defendants Fields, Friedman and Davis voluntarily and no promise or threat of any kind whatsoever has been made by plaintiff Commission or any member, officer, agent, or representative thereof to induce Fields, Friedman, and Davis to enter into this consent.

GOVERNMENT
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U. S. DIST. COURT
S. D. OF N. Y.

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4. Defendants Fields, Friedman, and Davis agree to respond to any subpoena or notice to take deposition issued by the United States District Court for the Southern District of New York at the request of the Commission, or in the case of a notice to take deposition issued by the Commission, in connection with any aspect of this litigation, as if they were still parties to such litigation; and failure to comply with such notice or subpoena without lawful cause shall constitute contempt of Court, without waiving any of their constitutional rights.

Dated: New York, New York
Dec 10th and Dec 11th 1975

Douglas P. Fields
DOUGLAS P. FIELDS

FREDERICK M. FRIEDMAN

Peter S Davis
PETER S. DAVIS

APPROVED:

SHEA GOULD CLIMENKO KRAMER & CASEY

By:

SAUL S. STREIT, A Member
(Attorneys for Defendants Douglas
P. Fields, Frederick M. Friedman,
and Peter S. Davis)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On this 11th day of December, 1975, before me personally appeared Douglas ~~P.~~ Fields, ~~Frederick M. Friedman,~~ ~~and~~ Peter S. Davis to me known and known to me to be the person~~s~~ who executed the foregoing instrument and ~~they~~ duly acknowledged to me that ~~they~~ executed same.

Anne D'Andrea
NOTARY PUBLIC

ANNE D'ANDREA
Notary Public, State of New York
No. 41-0853810 Queens County
Certificate filed in New York County
Term Expires March 30, 1977

A 168

[illegible]

[illegible] pursuant to Section [illegible] of the Act

[illegible] pursuant to Section [illegible] of the Act

[illegible] Par Value

Indicate by check mark whether the registrant (1) has filed [illegible] to the filing requirements [illegible]

GOVERNMENT

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SEC. [illegible]

SEP 28 [illegible]

(Fee Required)

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K

Annual Report Pursuant to Section 13 or 15(d) of
the Securities Exchange Act of 1934

For the fiscal year ended June 30, 1976

Commission File No. [illegible]

[illegible] Industries, Inc.
(Exact name of registrant as specified in its charter)

New York	11-2117396
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification Number)
[illegible] 42nd Street, New York, N.Y.	10017
(Address of principal executive office)	(Zip Code)

Registrant's telephone number, including area code (212) 972-1510

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered
None	None

Securities registered pursuant to Section 12(g) of the Act:

Common Shares, $.20 Par Value

Indicate by check mark whether the registrant (1) has filed all annual, quarterly and other reports required to be filed with the Commission and (2) has been subject to the filing requirements for at least the past 90

YES X NO __

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S. D. OF N. Y.

highest paid officers whose aggregate direct remuneration from the Registrant and its subsidiaries exceeded $40,000, and the aggregate direct remuneration of all officers and directors as a group during the last fiscal year:

Name	Capacities in which Remuneration was Received	Aggregate Direct Remuneration (1)
Douglas B. Fields	President	$128,437
Edward A. Lampert	Chairman of the Board and Executive Vice President	108,797
Frederick M. Friedman	Financial Vice President, Treasurer and Secretary	78,352
Gerald Galles	Vice President	72,021
All Officers and Directors as a group (7 persons)		[illegible]

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(1) See Paragraph (c) below and Items 14. and 15. for information concerning additional compensation.

(b) A contribution to a qualified profit sharing plan and a qualified pension plan of a subsidiary of the Registrant has been made in the amount of approximately $20,000 to each plan for each of Messrs. Lampert, Fields, Friedman and Galles for the Registrant's fiscal year ended June 30, 1976. Through such date, contributions of approximately $103,180, $89,400, $[illegible]7,900 and $114,[illegible] have been made to qualified profit sharing or pension plans of subsidiaries of the Registrant since inception of these plans for the benefit of Messrs. Lampert, Fields, Friedman and Galles, respectively.

(c) Messrs. Lampert, Fields, Friedman and Galles have each entered into employment agreements with the Registrant and its subsidiaries, providing for base annual compensation respectively, as follows: $[illegible], $128,[illegible], $[illegible] and $[illegible]. Such amounts are subject to cost of living increases to be determined each year as defined in the respective employment agreements. The employment agreements with Messrs. Fields, Friedman and Gelles expire July 1, [illegible] and the employment agreement with Mr. Lampert expires on August 31, 1978 but is subject, at his option, to be extended for two additional five-year terms.

During the fiscal year ended June 30, 1975, Mr. Gelles received a bonus of $25,000 pursuant to agreement with the Registrant respecting its Florida operations. In addition, Messrs. Lampert, Fields, Friedman and Gelles each received a bonus in the amount of $[illegible],000 for services rendered during the fiscal year ended June 30, 1976.

See Item 15, "Interest of Management and Others in Certain Transactions", for information concerning other compensation.

Item 14. Options Granted to Management to Purchase Securities.

No officer or director of the Registrant was granted or exercised an option to purchase any securities from the Registrant since July 1, 1975 and no options were held by any such persons as at September 21, 1976.

Item 15. Interest of Management and Others in Certain Transactions.

Gerald Gelles and members of his family lease certain warehouse facilities to a subsidiary of the Registrant. The current aggregate base rentals for such facilities are $[illegible] and such leases expire in March, [illegible]. The Registrant believes that the present rental is comparable to rentals paid for

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[illegible]

~~[illegible]~~ OF THE SECURITIES AND EXCHANGE COMMISSION

Monday, April 25, 1977

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the

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@T@The Commission (Commissioners Loomis, Evans and Pollack), pursuant to the request of the United States Attorney's Office for the Southern District of New York authorized the referral of its investigative files in the matter of @W#TDA Industries, Inc., et al.@W# @F@(File NY-5092)@F@ to that office and to the United States Department of Justice for possible criminal prosecution, without recommendation.@T@

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A 175 , 1975

Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Re: SEC v. TDA Industries, Inc., et al.,
75 Civil 4519 (LWP)

Gentlemen:

On Dec 12, 1975, I consented, without admitting or denying any of the allegations in the Commission's Complaint, to a Final Judgment of Permanent Injunction and Order of Ancillary Relief in the above entitled action enjoining me from further violating the registration, anti-fraud, reporting and proxy provisions of the Securities Act of 1933 ("Securities Act") and Securities Exchange Act of 1934 ("Exchange Act"), Section 5(a) and 5(c) of the Securities Act and Sections 10(b), 13(a) and 14(a) of the Exchange Act and Rules 10b-5, 13a-1, 13a-11, 14a-3 and 14a-9 thereunder.

I understand that, pursuant to Rule 2(e) of the Rules of Practice of the Securities and Exchange Commission, such consent may result in a temporary suspension from practice before the Commission and that after an opportunity for a hearing such temporary suspension could become permanent. In consideration of the Commission's forbearance from instituting formal administrative proceedings against me pursuant to Rule 2(e), I hereby resign from appearing or practicing before the Commission. For the purpose of this letter of resignation, the term "appearing or practicing before the Commission" shall include, but not be limited to:

(a) directly or indirectly representing or advising any person

(i) in any administrative proceeding, investigation or investigatory hearing, instituted by order of the Commission; or

(ii) in any informal inquiry conducted by the Commission's staff; or

(iii) in any formal or informal conference, discussion or communication with the Commission or its staff, except where such conference, discussion or communication directly relates to (1) the

DEFENDANT

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conduct of litigation in the courts of the United States or of any state where such person is a party to the litigation, and (2) a proceeding or investigation being conducted by or before any governmental department or agency other than the Commission where such person is a party to the proceeding or investigation; and

(b) the preparation or filing on behalf of any person of, or the advising of any person in connection with the preparation or filing of, any statement, report or other document as may be required to be filed with the Commission under the federal securities laws or the rules and regulations promulgated thereunder; and

(c) representing or advising, in connection with any matter arising under or related to the federal securities laws or the rules and regulations promulgated thereunder, any broker or dealer in securities, national securities exchange, investment company, investment adviser, or public utility holding company, registered or required to be registered with the Commission, except where such representation or advice directly relates to the conduct of litigation in the courts of the United States or of any state or to a proceeding or investigation being conducted by or before any governmental department or agency other than the Commission; and

(d) rendering formal or informal advice to any person, whether in the form of a written or oral opinion of counsel, expressing an opinion with respect to the legality of any act, transaction, practice or course of conduct under, the nature of any duty, obligation or liability imposed by, or the interpretation of, any provision of the federal securities laws or the rules and regulations promulgated thereunder.

Nothing in this letter of resignation shall be construed as limiting or affecting my right under Rule 2(e)(4) of the Commission's Rules of Practice to apply to the Commission for reinstatement of my privilege to appear and practice before the Commission; provided, however, that in the event that I do apply to the Commission for reinstatement of my privilege to appear and practice before the Commission, for the purposes of that application only, the allegations contained in the Commission's Complaint filed in the above entitled action shall be deemed to be true, and my disqualification from appearing or practicing before the Commission shall continue unless and until I have been reinstated by the Commission for good cause shown. I further understand that notwithstanding any of the foregoing, I have no assurances that the Commission will act favorably upon any application for re-admission submitted by me.

Very truly yours,

Peter S. Davis

Dec 1, 1975

SHEA GOULD CLIMENKO KRAMER & CASEY

330 MADISON AVENUE

NEW YORK, NEW YORK 10017

WILLIAM A. SHEA
MILTON S. GOULD
JESSE CLIMENKO
ALLAN KRAMER
ROBERT J. CASEY
BRUCE A. HECKER
EDWIN M. JONES
JAMES J. A. GALLAGHER
BERNARD D. FISCHMAN
BERNARD J. RUGGIERI
[illegible] SHELTON
ALLAN J. PARKER
RALPH L. ELLIS
ROBERT J. RUBEN
GEORGE DE GENARO
IRVING JACOBSON
SHELDON D. CAMHY
SAMUEL W. INGRAM, JR.
FREDRIC J. KLINK
JOHN J. McDERMOTT
WILLIAM A. HAGAN, JR.
PETER GETTINGER
JOHN A. CRAIG
MICHAEL LESCH
KEVIN D. McGRATH
LEON P. GOLD
WILLIAM C. FINNERAN, JR.
VINCENT W. QUINN, JR.
RONALD H. ALENSTEIN
HERMAN A. BURSKY
ARNOLD S. JACOBS
JAMES D. PORTER, JR.
THOMAS E. CONSTANCE
IRA POSTEL
LESTER YASSKY

AREA CODE 212
661-3200
CABLE ADDRESS
HOLMANG

MILES F. McDONALD
SAUL S. STREIT
CHRISTOPHER C. McGRATH
OF COUNSEL

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

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Files

December 19, 1975

Mr. Jeffrey Tucker
Ass't Regional Administrator
Securities & Exchange Commission
26 Federal Plaza
New York, New York 10007

Re: SEC v. TDA Industries, Inc., et al.

Dear Mr. Tucker:

This is to confirm our understanding concerning a clarification and amplification of Article VII of the Final Judgment of Permanent Injunction and Order of Ancillary Relief which provides that the defendants Fields, Friedman and Davis are to furnish a bond or other collateral within thirty (30) days after the entry of judgment.

As you know, Transaction No. 1 in paragraph V, refers to the Westcalind obligation in the sum of $50,000 as against Fields and Friedman; Transaction No. 2 refers to the obligation to TDA Industries, Inc. in the sum of $435,000 as against Fields, Friedman and Davis; and Transaction No. 3 refers to the $100,000 obligation to TDA Industries, Inc. as against Fields and Friedman.

It is understood that Fields, Friedman and Davis will each secure a bond or other collateral satisfactory to the Commission in the sum of $120,916.67 which guarantees their performance under Transaction No. 2 ($435,000 less $72,250, leaving a balance of $362,750) within the thirty (30) days after judgment. However, with respect to Transactions

Nos. 1 and 3, it is understood that Fields and Friedman shall have an additional six (6) months in which to secure a bond or other collateral satisfactory to the Commission which guarantees their obligation to Westcalind and TDA Industries, Inc. in the sum of $50,000 and $100,000, respectively, and if at the end of the six (6) mont[illegible]eriod (August 1, 1976), there is a deficiency in any part of [illegible]yment of the total sum of $150,000, Fields and Friedman w[illegible]lateralize that deficiency with a bond or other collatera[illegible]isfactory to the Commission on August 1, 1976.

I have this day spoken to Messrs. Fields and Friedman and they are in accord with each and every part of the Final Judgment of Permanent Injunction and Order of Ancillary Relief, as well as the above amplification and clarification of Article VII.

If this meets with your understanding, please initial the enclosed copy and return to me.

Upon receipt of this copy, I shall forward to you the signed and notarized Consents of the three defendants as well as the letter of Mr. Davis.

Thanking you and Mr. Perlmutter for all of your courtesies, in which Mr. Gould joins me.

Cordially,

Saul S. Streit

SSS:av

Enclosure

The Chairman then discussed the results of the operations of the Economy Enterprises division of the Corporation and proposed that the Corporation pay a bonus of $20,000 to each of Messrs. Jack Cohen and Fred Cohen, as managers thereof. Thereafter, upon motion duly made, seconded and unanimously carried, it was

> RESOLVED, that the Corporation declare and pay a bonus in the amount of $20,000 to each of Messrs. Jack Cohen and Fred Cohen, managers of the Economy Enterprises division of the Corporation, in recognition of their efforts on behalf of the Corporation.

The Chairman then updated the directors on the status of the litigation between Western Holding Corporation (now called Continental Western Industries, Inc.) adv. L. Handlesman & Co. and various of the latter's partners including the fact that certain documents had been turned over to the attorney for the defendants in that action and that a subpeona would issue from those defendants to the Corporation. The Chairman further advised the Board that the defendants in said action had executed a General Release to the Corporation and that the plaintiff has also issued a release to the Corporation as part of the settlement agreement of December 5, 1971.

The Chairman then initiated a discussion concerning an investigation being conducted by the New York County

DEFENDANT EXHIBIT F

District Attorney's office, apparently involving, in various respects, the former general counsel of the Corporation, Bernardi Resources Corp., perhaps the Corporation, as well as certain of the Corporation's officers and certain individuals who have acted as finders, brokers, or financial consultants for the Corporation. Herbert C. Kantor, Esq., counsel to the Corporation, outlined in detail all of the facts and conclusions which he had in his possession as a result of his own independent investigation conducted at the request of the President and Treasurer of the Corporation and the Executive Committee of the Board of Directors. Mr. Kantor informed the meeting that approximately 213,000 to 236,000 common shares of the Corporation owned by D.H. Blair Securities Corporation and Enterprise Research and Development, Inc. and others were sold by such shareholders to Bernardi Resources Corp. in April and May of 1971 upon the opinion of the then counsel to the Corporation that such sale would not be in violation of the Securities Act of 1933. Such general counsel, after borrowing funds from the Corporation, assisted Bernardi Resources Corp. in making the initial purchase of common shares from the shareholders that sold such shares to Bernardi Resources Corp. Bernardi Resources Corp. promptly resold such common shares through registered broker-dealers, relying upon the opinion of the then general counsel to the Corporation that such sale would not be in violation of the

Securities Act of 1933, and received a substantial profit upon such resale. It has been calculated that the total profit received by Bernardi Resources Corp. from this transaction aggregated in excess of $400,000. Of this amount, $284,375.00 (represented by a note made payable to the Corporation's Financial Vice President, Frederick M. Friedman, and accepted by him on behalf of the Corporation) was to have been turned over to the Corporation by Bernardi Resources Corp. by April and May, 1974 pursuant to an oral negotiated agreement made in 1971 (which provided that 70% of the profits realized by Bernardi Resources Corp. on the re-sale of the aforesaid approximately 213,000 to 236,000 common shares of the Corporation would be turned over to the Corporation within three years after the transaction) not heretofore discussed with the entire Board of Directors, although disclosed in detail to the Executive Committee of the Board of Directors in October, 1974. Of this $284,375.00 represented by the aforesaid note, and other sums which might be properly owing to the Corporation, the sum of $72,250.00 has actually been collected, in currency, by or on behalf of the Corporation by its President, Financial Vice President and former legal counsel, as agents, and has been held by them together with the note on behalf of the Corporation pursuant to an understanding arrived at in 1971. This $72,250.00 is being deposited into the accounts of the Corporation. The balance of the note, in the amount of

$212,125.00 and any other sums properly owing to the Corporation have not been collected and the principals controlling Bernardi Resources Corp., particularly Stanley I. Schonbrun, Esq. of the law firm of Schonbrun and Rudolph, and Bernardi Resources Corp. have refused to turn over such funds to the Corporation or to account for the funds due. The funds due the Corporation may exceed the aforesaid $212,125.00. No notations have been made on the $284,375.00 note to indicate that the $72,250.00 received by the Corporation was a payment against the principal amount of the note.

Mr. Schonbrun and others have made conflicting statements concerning this transaction, have instigated an investigation by the New York County District Attorney's Office, initially claiming that they were threatened by extortion, and have further claimed that they paid the sum of $72,250.00 to the President, Financial Vice President and former legal counsel to the Corporation as personal payment of their share in the profits of the sales transactions.

The Chairman described a second transaction which occurred in March, 1971 in which an affiliate of the Corporation, Westcalind Corp. (which was at that time known as Monarch Electronics International, Inc.), acquired Trophies, Inc. and Affiliated Companies. In connection with this transaction, a finder's fee in the amount of $50,000 was paid by Westcalind Corp. to Bernardi Resources Corp. whose general counsel is the same aforesaid Stanley I. Schonbrun, Esq. The seller of Trophies, Inc. and Affiliated Companies, Sol L. Resnik, also paid a finder's fee, in the amount of $40,000, to Octagon Industries, Inc. During the investigation by the New York County District Attorney's Office, instigated by Mr. Schonbrun, of the sale of the Corporation's common shares described above, Mr. Schonbrun claimed that he and Bernardi Resources Corp. did not act as a finder in this transaction, but that the finder's fee that was paid was a device created by him and officers and directors of Monarch Electronics International, Inc. to obtain an improper and illegal fee from Monarch Electronics International, Inc. and that upon receipt of such fee, Mr. Schonbrun immediately paid over a substantial portion of such fee, in currency, to Frederick M. Friedman, described by Mr. Schonbrun as the Treasurer of Monarch Electronics International, Inc. (but, in fact, not then an officer or director of Monarch Electronics International, Inc.).

The Chairman cautioned that the information disclosed here, which refers to statements of Mr. Schonbrun, is not known firsthand by the Chairman or general counsel and may be substantially inaccurate and/or substantially incomplete and, in all likelihood, is not inclusive of allegations of

Mr. Schonbrun and/or his associates.

The President and the Financial Vice President of the Corporation have disclaimed that they have knowingly acted in any way other than in the best interests of the Corporation and of Westcalind Corp. and have further disclaimed any personal liability in connection with such transactions. However, in order to dispel any questions which might otherwise be raised concerning conflicts of interest by them, they have offered to enter into agreements with the Corporation to indemnify the Corporation for the total of the amounts, if any, found to be due to the Corporation from the aforesaid transaction in the event that such amounts cannot be collected from the responsible parties. They intend to enter into similar agreements with Westcalind Corp. subject to the advice of Westcalind Corp.'s counsel. Peter S. Davis, former counsel to the Corporation, has been requested to execute a form of indemnification agreement also. They have also requested that the Corporation be authorized to investigate and to prosecute all legal claims for acts committed against the interests of the Corporation and/or claims which the Corporation may have a right to assert, including claims for the entire $400,000, plus or minus, total profits realized by Bernardi Resources Corp. and its principals or controlling

Davis O'Sullivan Weil & Wolff ("DOWW") made in the past, including the fact that in 1970 at one point up to $300,000, perhaps more, was owed by DOWW to the Corporation and in 1971 approximately $200,000 or more, at various times, was loaned by the Corporation to Peter S. Davis and/or DOWW, including a $100,000 loan to Peter S. Davis by the Corporation, which funds were used in the Bernardi Resources Corp. transaction previously discussed. In 1972, in excess of $120,000 in loans were outstanding to Peter S. Davis and/or DOWW and it was not until recently that all loans made to Peter S. Davis and/or DOWW were repaid to the Corporation, generally with interest although interest was not collected in every case. The Board of Directors again indicated that these arrangements in the past, including the $100,000 loan to Peter S. Davis in April 1971, did not require any action by the Board of Directors. Nevertheless, upon motion duly made, seconded and unanimously carried, it was

> RESOLVED, that loans heretofore made by the Corporation to Peter S. Davis and/or Davis O'Sullivan Weil & Wolff, former general counsel to the Corporation, including a loan in the amount of $100,000 to Peter S. Davis used by him in connection with the sale by certain shareholders of the Corporation of common shares of the Corporation to Bernardi Resources Corp. in 1971, be, and they hereby are, ratified, confirmed and approved on behalf of the Corporation and it was further

> RESOLVED, that the action of the executive officers of the Corporation, in effecting such loans on behalf of the Corporation be, and they hereby are, ratified, confirmed and approved on behalf of the Corporation.

Several members of the Board wished to refer back to the specific matters described to the Board by the Chairman and by the general counsel to the Corporation relating to the Bernardi Resources Corp. stock purchases and sales and the allegations of Mr. Schonbrun, and the extensive discussion which ensued. Several members of the Board expressed their belief that in spite of such allegation and events, the Bernardi Resources Corp. transaction and related events were no different than any other transaction consummated by the officers of the Corporation on behalf of the Corporation. Furthermore, in response to the Corporation's general counsel's request for, and the voluntary willingness of Fields and Friedman to provide indemnification to the Corporation with regard to this transaction, the Board nevertheless felt that Fields and Friedman should not, in any way, indemnify the Corporation or be required to indemnify the Corporation. Furthermore, as expressed by Messrs. Smircina, Gold, Lampert, Gelles and Shenkman, the Bernardi Resources Corp. stock transactions were clearly in the best business interests of the Corporation as well as resulting in the elimination of a potential major problem and, in fact, may result in profit to the Corporation. Additionally, the stock transactions resulted in the elimination of major stockholders who had in the past been a hindrance to the Corporation in the achievement of its strategic objectives. In spite of the allegations that had been made and the connotations that someone could place on certain events, the Board, after substantial discussion, refused to give any credence to the allegations that the Corporation's officers engaged in any self-dealing. Mr. Smircina expressed his feeling that for certain of the officers to enter into any indemnification agreement might place both the transactions and the officers in question and, since the Board of Directors unanimously felt that there was no question that the officers reasonably believed in the legality and the appropriateness of the transactions under investigation, and in light of the circumstances existing at that time, and otherwise, there should be no indemnification required from the officers. The Board agreed that during the past five and one-half years, the officers in question had had numerous opportunities to benefit themselves vis-a-vis the interests of the Corporation and in no cases did so, and, in fact, have always acted with total integrity and selflessness in the Corporation's interest.

On the other hand, each of Messrs. Fields and Friedman expressed the desire to execute the indemnification agreement so that there would be no appearance of any conflict of interest between themselves and the Corporation and to forestall

MINUTES OF SPECIAL MEETING
OF
BOARD OF DIRECTORS
OF
TDA INDUSTRIES, INC.

A special meeting of the Board of Directors of TDA Industries, Inc. was held at the office of the Corporation, 122 East 42nd Street, New York, New York at 3:00 P.M. on July 8, 1975, pursuant to written notice.

There were present:

Douglas P. Fields	Jack E. Smircina
Frederick M. Friedman	William W. Wilcox
Edward Lampert	Ronald Gold
Gerald Gelles	Stanley I. Feldman

constituting a majority of the Board of Directors and a quorum. Also in attendance at the meeting, by invitation, were Herbert C. Kantor, Esq., Alan E. Sandberg, Arthur M. Gilman, Esq. and David I. Ferber, Esq.

Douglas P. Fields acted as Chairman of the meeting and Frederick M. Friedman acted as Secretary.

The Chairman called the meeting to order and distributed to the assembled directors copies of the minutes of the last meeting of the Board of Directors held on January 23, 1975.

DEFENDANT EXHIBIT H

(Exh. H)

although such information had been requested. Mr Kantor reported that Mr.Schonbruns's secretary had advised him that Mr. Schonbrun had undergone two separate operations, and that he would not be available for interview in the foreseeable future. Mr. Kantor as well as the executive officers of the Corporation had attempted to locate Mr. Schonbrun at the several hospitals in New York City and Miami, Florida, where, it was felt, he might have been. All attempts to communicate with Mr. Schonbrun failed. Mr. Fields interrupted to state that on several occasions he had sent certified mail letters on behalf of the Corporation to each of Mr. Schonbrun, his law partner, L. Michael Rudolph, Esq., to the law firm of Schonbrun & Rudolph, to Bernardi Resources Corp. and to H.E. Tony Bernardi, in each case demanding immediate payment upon the promissory note held by the Corporation issued by Bernardi Resources Corp. Except in the case of the second letter to Mr. Rudolph, which was apparently ignored, Mr. Schonbrun's secretary responded to Mr. Fields with the information that Mr. Schonbrun was not available to respond.

Mr. Kantor continued his review and stated that in January of this year he had disclosed to the Staff of the SEC that the Corporation and Westcalind Corp. were being investigated by the District Attorney's Office. He informed the Staff of the SEC of the accusations made by Mr. Schonbrun with respect to the finder's fee and the stock transactions and thereafter the Corporation and Westcalind Corp. each filed Current Reports on Form 8-K for the Month of January, 1975 with the SEC formally setting forth these disclosures. The Quarterly Report on Form 10-Q filed by the Corporation for the six months ended December 31, 1974 also reflected the relevant financial transactions. Numerious witnesses, including most of the members of the Board of Directors of the Corporation, had been called to testify before the Staff of the SEC. Mr. Kantor reported that on June 17, 1975 a member of the SEC Staff had informed him that their investigation was "95% complete" and that his Staff would not refer the matter for criminal prosecution. Instead, it was intended that the Staff at the New York Regional Office would recommend to the national office of the SEC that a civil complaint be issued relating to these matters and that Mr. Kantor, on behalf of the Corporation, and other counsel, on behalf of individual parties, would be given the opportunity to discuss the content of the civil complaint with the Staff of the SEC prior to the issuance of any complaint. It is presently expected that the proposed civil complaint will name as individual defendants Douglas P. Fields, Frederick M. Friedman and Peter S. Davis. To date, the Staff has indicated that it has not made a final determination with respect to the possible inclusion within the complaint of Messrs. Alan Sandberg, Eric Berge, Westcalind Corp. or the Corporation.

In connection with these matters, Mr. Kantor called the attention of the Board to certain Indemnification Agreements the aggregate payment would probably be paid prior to that time. Thereafter, upon motion duly made, seconded and unanimously carried among the members of the Board present (Messrs. Freidman, Gelles, Lampert and Fields abstaining), it wa

> RESOLVED, that a cost of living adjustment compensation payment be made in the aggregate to Edward A. Lampert, Frederick M. Friedman, Gerald Gelles and Douglas P. Fields for the period July, 1972 through July, 1975, in a sum determined as the amount of the aggregate compensation received by such officers, during the fiscal year ended June 30, 1975 multiplied by the percentage increase in the Consumer Price Index during such three year period, allocated among each o such executive officers as the Board of Directors of Pemberton Services Corp. shall determine.

The Chairman next presented to the assembled directors a proposal that the current Employment Agreements with each of Messrs. Lampert, Friedman, Gelles and himself be amended to provide for: (1) an annual cost of living adjustment to the basic annual compensation payable to each of them, based upon increases in the Consumer Price Index, as defined, for each fiscal year of the terms of such Employment Agreements commencing with the current fiscal year ending June 30, 1976; (2) an extension of the terms of the Employment Agreements of each of Messrs. Friedman, Gelles and Fields; (3) a guarantee by the Corporation of the current Employment Agreement between Mr. Lampert and Pemberton Services Corp.; and (4) the assumption by Pemberton Services Corp. of the Employment Agreements of each of Messrs. Friedman, Gelles and Fields. The Chairman distributed to the assembled directors copies of proposed forms of Amendatory Agreements incorporating these provisions

A 193

DISTRICT COURT
FILED
FEB 20 1976
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, : 75 Civil 4519 (LWP)

-against- :

TDA INDUSTRIES, INC.
WESTCALIND CORP.
DOUGLAS P. FIELDS
FREDERICK M. FRIEDMAN
PETER S. DAVIS
✓ERIC BERGE
ALAN E. SANDBERG

Defendants. :

CONSENT
FINAL JUDGMENT OF
PERMANENT INJUNCTION
AND ORDER OF ANCILLARY
RELIEF AGAINST ERIC BERGE

MICROFILM
FEB 2[illegible] 1976

Plaintiff, Securities and Exchange Commission ("Commission"), having filed its Complaint herein on September 16, 1975, there having been no trial with respect thereto; defendant Eric Berge ("Berge") having acknowledged in the attached Consent receipt of a copy of the Summons and Complaint filed herein, having admitted the in personam jurisdiction of the Court over him and the jurisdiction of this Court over the subject matter of the action; defendant Berge having waived entry of findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure with respect to the entry of this Final Judgment of Permanent Injunction and Order of Ancillary Relief; and defendant Berge, having agreed, without admitting or denying the allegations in the Commission's Complaint, to the entry of this Final Judgment of Permanent Injunction and Order of Ancillary Relief; and it further appearing that this Court has jurisdiction over the parties and the subject matter hereof, it is hereby

DEFENDANT EXHIBIT J

I

ORDERED, ADJUDGED AND DECREED that defendant Berge, his agents, servants, employees, attorneys, nominees, and those persons acting in concert or participation with him, and each of them, be and are hereby permanently enjoined from:

A. Directly or indirectly violating, or aiding and abetting violations of, Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the offer for sale, sale, offer to purchase or purchase of shares of the common stock of Westcalind Corp., or any other security,

(1) to employ any device, scheme or artifice to defraud;

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

B. Directly or indirectly violating, or aiding and abetting violations of, Section 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a), and the rules and regulations thereunder, by filing with the Commission annual and other periodic reports required to be filed with the Commission by the Securities Exchange Act of 1934 and the rules and regulations thereunder, for Westcalind Corp., its successors, or any other issuer required to file such reports, containing untrue statements of material fact or omitting to state any material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, or omitting information required to be stated therein, concerning, among other things:

(1) the financial condition of the registrant;

(2) the existence of side-agreements, arrangements, or understandings, written or oral, among the registrant, its directors, officers, and affiliates; and

(3) the use of the registrant's assets for the personal benefit of directors and officers of the registrant.

C. Directly or indirectly violating, or aiding and abetting violations of, Section 14(a) of the Securities Exchange Act of 1934, 15 U S.C. 78n(a), and Rules 14a-3 and 14a-9 thereunder, 17 C.F.R. 240.14a-3 and 240.14a-9, by using or causing to be used any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange, to solicit proxies for securities of Westcalind Corp., its successors, or any other issuer registered pursuant to Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 781, by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false and misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false and misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading, or by failing to include in proxy statements for securities of Westcalind Corp., or any other issuer registered pursuant to Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78l, any information required by Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), and the rules and regulations thereunder, including, but not limited to, the material direct or indirect economic benefit received by the issuer's officers, directors, and nominees for election as director, arising out of transactions to which the issuer is or was a direct or indirect party or participant.

II

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Berge shall be prohibited from, directly or indirectly, assuming a position as, or continuing to act as, an officer or director of Westcalind Corp., TDA Industries, Inc., and their subsidiaries, affiliates and successors, which prohibition shall be for a period of two (2) years from date hereof.

III

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction of this action to implement and carry out the terms of its decree and of all additional decrees or orders appropriate in the public interest for the protection of investors.

And there being no just reason for delay, the Clerk of the Court is hereby directed to enter this Judgment and Order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: New York, New York
FEBRUARY 13, 1975

UNITED STATES DISTRICT JUDGE U.S.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, : 75 Civil 4519 (LWP)

-against- :

TDA INDUSTRIES, INC. :
WESTCALIND CORP.
DOUGLAS P. FIELDS :
FREDERICK M. FRIEDMAN
PETER S. DAVIS :
ERIC BERGE
ALAN E. SANDBERG :

Defendants. :

CONSENT OF DEFENDANT
ERIC BERGE TO FINAL
JUDGMENT OF PERMANENT
INJUNCTION AND ORDER
OF ANCILLARY RELIEF

---

1. Defendant Eric Berge ("Berge") admits the in personam jurisdiction of this Court over him and the jurisdiction of this Court over the subject matter of this action, admits the service of the Summons and Complaint upon him and admits that the Complaint filed herein by the plaintiff Securities and Exchange Commission ("Commission") states claims upon which relief may be granted; and defendant Berge waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

2. Defendant Berge, without admitting or denying any of the allegations in the Commission's complaint, hereby consents to the entry of the Final Judgment of Permanent Injunction and Order of Ancillary Relief in the form annexed hereto, without further notice.

3. This consent is given by defendant Berge voluntarily and no promise or threat of any kind whatsoever has been made by plaintiff Commission or any member, officer, agent, or representative thereof to induce Berge to enter into this consent.

4. Defendant Berge agrees to respond to any subpoena or notice to take deposition issued by the United States District Court for the Southern District of New York at the request of the Commission, or in the case of a notice to take deposition issued by the Commission, in connection with any aspect of this litigation, as if he were still a party to such litigation; and failure to comply with such notice or subpoena without lawful cause shall constitute contempt of Court.

Dated: Encino, California
February 10 1976

Eric Berge
ERIC BERGE

STATE OF CALIFORNIA)
COUNTY OF Los Angeles) ss.:

On this 10th day of February, 1976, before me personally appeared Eric Berge to me known and know to me to be the person who executed the foregoing instrument and he duly acknowledged to me that he executed same.

William Blatt
NOTARY PUBLIC

OFFICIAL SEAL
WILLIAM BLATT
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires MAY 7, 1979

SA 38a-475
(ED. 4-28-71)

DEFENDANT
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

L - id
(Sandberg)

FPI-MI—9-24-75-50M-4417

IN REPLYING PLEASE QUOTE
NY-E:RP

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
REGIONAL OFFICE
26 FEDERAL PLAZA
NEW YORK, N.Y. 10007

January 20, 1976

Norman S. Ostrow, Esq.
Miller & Summit
90 Broad Street
New York, New York 10004

Re: SEC v. TDA Industries, Inc., et al.
75 Civil 4519 (LWP)

Dear Mr. Ostrow:

Enclosed please find an original and two copies of an Affidavit of Acknowledgment and a certified copy of a Final Judgment of Permanent Injunction and Order of Ancillary Relief Against Alan E. Sandberg. Please have Mr. Sandberg insert the date of service of the certified copy of the Final Judgment of Permanent Injunction and Order of Ancillary Relief in the space provided in the Affidavit of Acknowledgment and have him sign and have notarized the original and one copy of the Affidavit of Acknowledgment. After he has done so, retain a copy of the Affidavit for your files and return the executed original and executed copy to us.

In order for this matter to be properly concluded as against your client, it is essential that a properly executed original and copy of the Affidavit of Acknowledgment be returned to us at your earliest convenience.

Thank you for your cooperation in this matter.

Very truly yours,

WILLIAM D. MORAN
Regional Administrator

by Stuart Perlmutter
Stuart Perlmutter
Chief Attorney, ~~Br.~~ #4

Enclosures
As stated above.

Mr Sandberg -
this is for your file

A 200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x	75 Civil 4519 (LWP)
SECURITIES AND EXCHANGE COMMISSION: Plaintiff, : -against- : TDA INDUSTRIES, INC. : WESTCALIND CORP. DOUGLAS P. FIELDS : FREDERICK M. FRIEDMAN PETER S. DAVIS : ERIC BERCE ALAN E. SANDBERG : Defendants. :	FINAL JUDGMENT OF PERMANENT INJUNCTION AND ORDER OF ANCILLARY RELIEF AGAINST ALAN E. SANDBERG
- x	

U.S. DISTRICT COURT
FILED
JAN 15 1976
S.D. of N.Y.

Plaintiff, Securities and Exchange Commission ("Commission"), having filed its Complaint herein on September 16, 1975, there having been no trial with respect thereto; defendant Alan E. Sandberg ("Sandberg") having acknowledged in the attached Consent receipt of a copy of the Summons and Complaint filed herein, having admitted the in personam jurisdiction of this Court over him and the jurisdiction of this Court over the subject matter of the action; defendant Sandberg having waived entry of findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure with respect to the entry of this Final Judgment of Permanent Injunction and Order of Ancillary Relief; and defendant Sandberg, having agreed, without admitting or denying the allegations in the Commission's Complaint, to the entry of this Final Judgment of Permanent Inunction and Order of Ancillary Relief; and it further appearing that this Court has jurisdiction over the parties and the subject matter hereof, it is hereby

JAN 16 1976

I

ORDERED, ADJUDGED AND DECREED that defendant Sandberg, his agents, servants, employees, attorneys-in-fact, nominees, and those persons acting in concert or participation with him, and each of them, be and are hereby permanently enjoined from directly or indirectly violating, or aiding and abeting violations of, Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the offer for sale, sale, offer to purchase or purchase of shares of the common stock of TDA Industries, Inc., or any other security,

(1) to employ any device, scheme, or artifice to defraud;

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

II

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Sandberg shall, within thirty (30) days after the entry of this Judgment and Order, return 28,000 shares of TDA Industries, Inc. common stock to TDA Industries, Inc.

III

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction of this action to implement and carry out the terms of its decree and of all additional decrees or orders appropriate in the public interest for the protection of investors.

✓ And there being no just reason for delay, the Clerk of the Court is hereby directed to enter this Judgment and Order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: New York, New York
January 9th, 1976.

/s/ L. W. Pierce
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED: 1/16/76

/s/ Raymond F. Burghardt
CLERK

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

SECURITIES AND EXCHANGE COMMISSION : 75 Civil 4519 (LWP)

Plaintiff, : CONSENT OF DEFENDANT ALAN E. SANDBERG TO FINAL JUDGMENT OF PERMANENT INJUNCTION AND ORDER OF ANCILLARY RELIEF

-against- :

TDA INDUSTRIES, INC. :
WESTCALIND CORP.
DOUGLAS P. FIELDS :
FREDERICK M. FRIEDMAN
PETER S. DAVIS :
ERIC BERGE
ALAN E. SANDBERG :

Defendants. :

- -x

1. Defendant Alan E. Sandberg ("Sandberg") admits the in personam jurisdiction of this Court over him and the jurisdiction of this Court over the subject matter of this action, admits the service of the Summons and Complaint upon him and admits that the Complaint filed herein by the plaintiff Securities and Exchange Commission ("Commission") states claims upon which relief may be granted; and Sandberg waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

2. Defendant Sandberg, without admitting or denying any of the allegations in the Commission's complaint and for the purpose of this action only, hereby consents to the entry of the Final Judgment of Permanent Injunction and Order of Ancillary Relief in the form annexed hereto, without further notice.

3. This consent is given by defendant Sandberg voluntarily and no promise or threat of any kind whatsoever has been made by plaintiff Commission or any member, officer,

agent, or representative thereof to induce Sandberg to enter into this consent.

4. Defendant Sandberg agrees to respond to any subpoena or notice to take deposition issued by the United States District Court for the Southern District of New York at the request of the Commission, or in the case of a notice to take deposition issued by the Commission, in connection with any aspect of this litigation, as if he were still a party to such litigation; and failure to comply with such notice or subpoena without lawful cause shall constitute contempt of Court.

Dated: New York, New York
JAN. 6 1976

ALAN E. SANDBERG

APPROVED: AS TO FORM

MILLER & SUMMIT

By:

NORMAN S. OSTROW, A Member
(Attorneys for Defendant
Alan E. Sandberg)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 6 day of January, 1976, before me personally appeared Alan E. Sandberg to me known and known to me to be the person who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Harriet Lobl
Notary Public

HARRIET LOBL
NOTARY PUBLIC, State of New York
No. 03-7578060
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1976

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
REGIONAL OFFICE
26 FEDERAL PLAZA
NEW YORK, N.Y. 10007

IN REPLYING PLEASE QUOTE
NY:E:JHT

A 205

December 1, 1975

'DEFENDANT
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
M - ~~12~~

Mr. John R. Wing
Assistant United States Attorney
United States Attorney's Office
Southern District of New York
U. S. Courthouse
One St. Andrew's Plaza
New York, N. Y. 10007

Dear Rusty:

Pursuant to our conversation of this day, I am forwarding to you certain pleadings regarding [illegible] TDA Industries litigation and Judge Weinfeld's opinion in the Meridian Fast Food Services litigation. Should you be desirous of examining our files in either of these matters, kindly make the appropriate request.

As I mentioned, the TDA Industries case raises a possible statute of limitations problem.

Should you have any questions in this regard, please do not hesitate to contact me at 264-1630.

Sincerely,

WILLIAM D. MORAN
Regional Administrator

By Jeffrey H Tucker
Jeffrey H. Tucker
Assistant Regional Administrator

Enclosures:

As stated above

A 206

EMICAL BANK

International Operations
P.O. Box 44, Church Street Stati
New York, N.Y. 10008

Irrevocable Commercial Letter of Credit APRIL 23, 1976

Customer's No.

Our credit: LC 849105
(to be mentioned on all drafts and communications relative thereto)

To

TDA INDUSTRIES, INC.
122 E. 42ND STREET
NEW YORK, NEWYORK

DEFENDANT
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

U - ix

~~001-29466~~

By order of

PETER S. DAVIS
1100PARK AVENUE
NEW YORK, N.Y. 10028

For Account of (same if left blank)

orig. & 1 copy

Gentlemen:

We hereby establish our irrevocable credit in your favor, for the account indicated above, for a sum or sums not exceeding in all . . . .

ONE HUNDRED TWENTY THOUSAND NINE HUNDRED SIXTEEN DOLLARS AND 67/100 UNITED STATES CURRENCY...(U.S.$120,916.67 U.S.C.)

Available by your draft(s) At SIGHT ON US AS SHOWN BELOW

~~Fax~~ XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

DRAFT(s) MUST BE ACCOMPANIED BY:

1. YOUR OFFICIALLY SIGNED STATEMENT CERTIFYING THAT YOUR DRAWING REPRESENTS THE AMOUNT XOWED BY PETER S. DAVIS, PURSUANT TO A SETTLEMENT, SIGNED BY PETER S. DAVIS, WITH THE SECURITIES AND EXCHANGE COMMISSION, WHICH AMOUNT HAS NOT BEEN PAID BY PETER S. DAVIS AS PER SAID SETTLEMENT.

IT IS A CONDITION OF THIS LETTER OF CREDIT THAT SHOULD PETER S. DAVIS REPAY ANY OR ALL AMOUNTS OWED PURSUANT TO SAID SETTLEMENT, YOU WILL ADVISE CHEMICAL BANK BY REGISTERED MAIL TO THIS EFFECT SUCH ADVICE TO CONSTITUTE YOUR AUTHORITY TO CHEMICAL BANK TO REDUCE THIS LIABILITY HEREUNDER BY THE AMOUNT(s) PAID.

WE HEREBY AGREE WITH YOU THAT DRAFTS DRAWN UNDER AND IN ACCORDANCE WITH THE TERMS OF THIS CREDIT WILL BE DULY HONORED UPON PRESENTATION AND DELIVERY OF DOCUMENTS AS SPECIFIED IF PRESENTED AT THIS OFFICE (55 WATER STREET 17 FL. SOUTH BUILDING, NEWYORK N.Y. 10041) not prior TO AUGUST 5, 1977, BUT NOT LATER THAN AUGUST 12, 1977 FOR U.S.$60,000.00 AND NOT PRIOR TO AUGUST 5, 1978 BUT NOT LATER THAN AUGUST 12, 1978 FOR THE BALANCE OF U.S.$60,916.67.

AT

Very truly yours,

Authorized Signature

Provisions applicable to the within mentioned credit
This credit is subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision), International Chamber of Commerce Publication No. 290.

110

02 0256* (3-76)

USA 33s - 475
(ED. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

AB - [illegible]

FPI-MI—9-24-76-50M-4417

ENFORCEMENT MANUAL
CRIMINAL REFERENCE CHAPTER

Prepared by:

Wallace L. Timmeny
David P. Doherty
Robert G. Ryan

Attorneys for the Division of
Enforcement

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CHAPTER

CRIMINAL CASES

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Section 32(a) of the 1934 Act provides:

> Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section /15/ of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed, but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Both provisions require the element of willfullness. Section 32(a) however provides that a term of imprisonment cannot be imposed for a rule violation if the defendant can prove he had no knowledge of the rule. 4/

The principal crime prosecuted under the 1933 Act is violation of 17(a) fraud in the sale of securities. 5/ Criminal prosecutions have also

---

4/ "Proof of no knowledge does not mean proof that the defendants did not know the precise number or common name of the rule, the book and page where it was to be found or the date upon which it was promulgated. It does not even mean proof of a lack of knowledge that their conduct was proscribed by rule than by statute. Proof of no knowledge means proof of an ignorance of the substance of the rule, proof that they did not know that their conduct was contrary to law." See U.S. v. Lilley 291 F. Supp. 989 (1968).

5/ 15 U.S.C. Sec. 77q(a). See, e.g., United States v. Kelly, 349 F2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966); United States v. Benjamin, 328 F2d 854 (2d Cir.), cert. denied, 377 U.S. 953 (1964); United States v. Crosby, 294 F2d 928 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962); Holmes v. United States, 134 F2d 125 (8th Cir.), cert. denied, 319 U.S. 776 (1943); Coplin v. United States, 83 F2d 652 (9th Cir. 1937); United States v. Birrell, 266 F Supp. 539 (S.D.N.Y. 1967); United States v. Robertson, 181 F. Supp. 158 (S.D.N.Y. 1959).

Criminal Cases

I. Nature

Criminal penalties are provided forwillful violations of the Federal securities laws. 1/ Jurisdiction over such criminal cases vests in the Federal District Courts. 2/ The Commission is authorized to transmit evidence concerning securities laws violations to the Attorney General who may in his discretion institute appropriate criminal proceedings. 3/ The overwhelming number of SEC criminal cases have been brought under Sections 24 of the 1933 Act and 32(a) of the 1934 Act. Section 24 of the 1933 Act states:

> Any person whowillfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who wilfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact. . . required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

1/ Securities Act of 1933 Sec. 24, 15 U.S.C. 77x ; Securities Exchange Act of 1934 32(a), 15 U.S.C. 78ff (a); Investment Company Act of 1940 49, 15 U.S.C. 80a-48 ; Investment Advisers Act of 1940 Sec. 217, 15 U.S.C. 80b-17; Trust Indenture Act of 1939 Sec. 325, 15 U.S.C. 77yyy: Public Utility Holding Company Act of 1935 Sec. 39, 15 U.S.C. 79z-3. See also Investment Company Act of 1940 Sec. 37, 15 U.S.C. 80a-36 Section 217, the "Penalties" provision of the Investment Advisers Act of 1940, 15 U.S.C. 80b-17 (1964), does not contain a clause relating to specific false filings as do the other statutes. 15 U.S.C. 77x. The 1933 Act has an additional quasi-criminal provisions, Section 22(b) 15 U.S.C. 77v(b), which provides that failure to obey a court order requiring compliance with an SEC administrative subpoena "may be punished by said court as a contempt thereof." See, e.g., Penfield Co. v. SEC, 330 U.S. 585 (1947).

2/ Section 22 of the Securities Act; Section 27 of the Exchange Act; Section 25 of the Holding Company Act; Section 322(b) of the Trust Indenture Act, Section 44 of the Investment Company Act; Section 214 of the Investment Advisors Act.

3/ Securities Act of 1933 Sec. 20(b), 15 U.S.C. Sec. 77t(b); Securities Exchange Act of 1934 Sec. 21(e), 15 U.S.C. Sec. 78u(e). Investment Company Act of 1940 Sec. 41(e), 15 U.S.C. Sec. 80a-41([illegible]); Investment Advisers Act of 1940 Sec. 209(e), 15 U.S.C. Sec. 80b-9(e); Trust Indenture Act of 1939 Sec. 321(a) & (b), 15 U.S.C. Sec. 77uuu(a) & (b); Public Utility Holding Company Act of 1935 Sec. 18(f), 15 U.S.C. Sec. 79r(f).

been brought under Section 5 of the 1933 Act6/- failure to register the sale of securities and Section 24 - filing a false registration statement. 7/ Criminal prosecutions under Section 17(b) of the 1933 Act (anti-touting provisions) have also been pursued. 8/

Under the 1934 Act, fraud in the purchase or sale of securities is prosecuted as criminal violation of Section 10(b) 9/ and 10b-5

6/ 15 U.S.C. Sec. 77e. See, e.g., United States v. Wolfson (Continental Enterprises), 405 F2d 779 (2d Cir. 1968) cert. denied, 394 U.S. 946 (1969); United States v. Abrams, 357 F2d 539 (2d Cir.), cert. denied, 384 U.S. 1001 (1966); United States v. Re, 336 F2d 306 (2d Cir), cert. denied, 379 U.S. 904 (1964).

7/ 15 U.S.C. Sec. 77x. See, e.g., United States v. Dallago, 427 F2d 546 (D.C. Cir. 1969); Swaffield v. United States, 403 F2d 666 (9th Cir. 1968); United States v. Galfand, SEC Lit. Release No. 4530 (E.D. Pa., Jan. 30, 1970); United States v. Wentland, 234 F. Supp. 936 (D.D.C. 1964); United States v. Pope, 189 F. Supp. 12 (S.D.N.Y. 1960). Occasionally, the sale of securities pursuant to a false or misleading registration statement is prosecuted as a criminal violation of the anti-fraud provisions of Section 17(a), 15 U.S.C. Sec. 77q(a), rather than as a false filing prosecution. See e.g. Danser v. United States, 281 F2d 492 (1st Cir. 1960); United States v. Danser, 26 F.R.D. 580 (D. Mass. 1959). The filing of a false registration statement or Regulation A notification and offering circular is sometimes prosecuted as a violation of 18 U.S.C. Sec. 1001 (the false statements statute). See, e.g., United States v. Neily, SEC Lit. Release No. 3054 (D. Mass., Oct. 9, 1964); United States v. Howard, SEC Lit. Release No. 2872 (D. Colo., March 18, 1964); United States v. de Lyra, SEC Lit. Release No. 2783 (S.D.N.Y. Nov. 13, 1963); United States v. Stefanich, SEC Lit. Release No. 2777 (N.D. Ga., Nov. 6, 1963); United States v. Ultrasonic Corp., SEC Lit. Release Nos. 1443 (D. Mass. May 18, 1959) & 1497 (Oct. 1, 1959).

8/ 15 U.S.C. Sec. 77q(b). See United States v. Van Vollmer, SEC. Lit. Release No. 3790 (S.D. Ind., Aug. 18, 1967), aff'd sub nom. United States v. Amick, 439 F2d 351 (9th Cir. 1971) (conviction after jury trial); United States v. Todd SEC Lit Release No. 1838 (D. Mass., Nov. 17, 1960), 21 SEC Ann. Rep. 166 (1961).

9/ 15 U.S.C. Sec.78j(b)(1964).

thereunder. 10/ Prosecutions for manipulations of listed securities 11/ and unlisted securities 12/ have been initiated under the 1934 Act. Other 1934 Act crimes that occasionally have been prosecuted include the failure to file required reports; the hindering, obstructing and delaying of the filing of required reports; the filing of false reports; and the use of false reports in communicating with prospective investors or existing shareholders. These include annual reports or form 10K, 13/ proxy statements 14/, broker dealer annual financial statements 15/, broker dealer subordinated loan agreements 16/, insider ownership reports 17/, broker-dealer registration statements on form B-D 18/and broker dealer books and records. 19/

10/ 39. 17 C.F.R. 240.10b-5. See, e.g., United States v. Re, 336 F. 2d 306 (2d Cir.) cert. denied, 379 U.S. 904 (1964); United States v. Wolfson (Merritt-Chapman & Scott), 289 F. Supp. 903 (S.D.N.Y., subquent convictions rev'd, 437 F. 2d 862 (2d Cir. 1970); United States v. Dowell, SEC Lit. Release No. 4269 (N.D. Ill., March 26, 1969); United States v. Lilley, 291 F. Supp. 989 (S.D. Tex. 1968); United States v. DeVol, SEC Lit. Release No. 4126 (S.D. Ind., Oct. 4, 1968); United States v. Wilensky, SEC Lit. Release No. 2923 (S.D. Fla., Jan. 21, 1964); United States v. Shindler, 173 F. Supp. 393 (S.D.N.Y. 1959); United States v. Griswold, 5 SEC Jud. Dec. 303 (N.D. Ohio 1947). **See** also 3 Loss 1449 n. 15.

11/ Section 9(a), 15 USC 78i e.g., United States v. Williams 424 F. 2d 344 (5th Cir. 1970); United States v. Re 336 F. 2d 306 (2nd Cir. 1964); United States v. Stein 450 F.2d [illegible] (1972).

12/ Section 10(b)5, 15 U.S.C. 78j(b) (1964) and rule 10b-5, 17 C.F.R. 240 10b-5 US v. Rand 308 F. Supp. 1231 (1970) dismissed on other ground.

13/ Section 13, 15 U.S.C. 78m rules 13a-1, 13a-11, 17 CFR 240.13a-1 240.13a-11. See U.S. v. Guterma 281 F. 2d 742 (2d Cir. 1960), U.S. v. Cohn, SEC Lit. Release No. 4193 (SDNY 1968), U.S. v. Leit[illegible] SEC Lit. Release No. 3985 (SDNY 1968).

14/ Section 14, 15 U.S.C. 78n (1964) See US v. Pope 189 F. Supp 12 (SDNY 1960) US v. Cashin 281 F. 2d 669 (9th Cir. 1960).

15/ Section 17(a), 15 USC 78q(a) (1964); rule 17a-5, 17 CFR 240.17a-5. See e.g. US v. Sills SEC Lit. Release No. 1592 (SD Fla Feb. 18, 1960).

16/ Rule 15c3-1(c)(7)(G), 17 CFR 240.15c3-1(c)(7)(G). See US v. Singleton SEC Lit. Release No. 4467 (ED Mo., Oct. 30, 1969).

17/ Section 16(a), 15 USC 78p(a). See e.g. US v. Guterma 281 F.2d 742 (2d Cir. 1960), US v. Orovitz SEC Lit. Release No. 4148 (SDNY 1968).

18/ Section 15(a) and (b), 15 USC 78o (a) and (b). See e.g. US v. Herman SEC Lit. Release No. 3974 (SDNY 1968).

19/ Section 17(a), 15 USC 78q(a) 1964; rules 17a-3, 17a-4, 17 CFR 240. 17a-3 and 240. 17a-4, see e.g., US v. Berman, SEC Lit Release No. 1368 (SDNY 1958)

Additional prosecutions under the 1934 Act have included: failure to disclose control of an issuer, 20/ failure to disclose illegal "free-riding," 21/ churning 22/ and illegal hypothecation of customers funds. 23/

The Commission has also brought criminal contempt prosecutions for violations of injunctions issued by the federal district courts. 24/ An SEC contempt case may be tried before a judge alone but a jury trial is required unless waived by a defendant if a court desires to impose a sentence greater than 6 months or $500. 25/ If a defendant

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20/ Section 15(c)(1), 15 USC 78o(c)(1) rule 15c1-5, 17 CFR 240. 15c1-5. E. g., US v. Grossman SEC Lit. Release No. 3097 (SD Cal 1964)

21/ Section 10b, 15 USC 78j(b), rule 10b-5, 17 C.F.R. 240. 10b-5. See US v. Lerner, SEC Lit Release No. 4383 (SDNY 1969).

22/ Sections 10(b), 15 USC 78j(b) and 15(c)(1), 15 USC 78o (c)(1), rules 10b-5, 17 CFR 240. 10b-5 and 15c1-7, 17 CFR 240. 15c1-7. See US v. McDermott 131 F. 2d 313 (7th Cir. 1942) US v. Keller SEC Lit. Release No. 2676 (D. Mass 1963).

23/ Section 8(c), 15 U.S.C. Sec. 78h(c). E.g., United States v. Morrison, 10 SEC Ann. Rep. 194 (N.D. Cal. 1944) (1942 decision). Many fraudulent broker-dealer practices often are prosecuted under section 17(a) of the 1933 Act. E.g., illegal conversion or hypothecation of customers' funds or securities: United States v. Tilney, SEC Lit. Release No. 4659 (D. Alaska, June 25, 1970); United States v. Savage, SEC Lit. Release Nos. 4356 (June 25, 1969), 4603 (E.D. La., April 30, 1970) & 4704 (July 29, 1970); United States v. Polycarpo, SEC Lit. Release No. 4579 (D. Mass., April 1, 1970); United States v. McKinnon, SEC Lit. Release No. 4456 (D. Mass., Oct. 23, 1969); United States v. Wexler, SEC Lit. Release No. 4160 (E.D. Pa., Nov. 18, 1968); United States v. Stedman, SEC Lit. Release No. 4116 (E.D. Tex., Sept. 18, 1968); United States v. Resnick, SEC Lit. Release No. 3937 (D. Mass., Feb. 28, 1968); United States v. Carnes, SEC Lit. Release No. 3095 (E.D. Va., Dec. 3, 1964); United States v. Tillotson, SEC Lit. Release No. 3082 (D. Wyo., Nov. 17, 1964); United States v. Copley, SEC Lit. Release No. 3077 (D. Wyo., Nov. 13, 1964); United States v. Malloy, SEC Lit. Release No. 2884 (M.D. Fla., March 30, 1964); United States v. Vettriano, SEC Lit. Release No. 2880 (D. Mich., March 30, 1964).

24/ E.g., Frank v. U.S. 395 U.S. 147 (1969), U.S. v. Custer Channel Wing Corp 376 F2d 675 (4th Cir.).

25/ Frank v. United States 395 U.S. 147 (1969).

pleads guilty of course, the sentence may be greater than 6 months since a guilty plea is deemed a waiver of jury trial. 26/ The sentence must be fine or imprisonment not both. 27/ Criminal contempt actions need not be referred to the Department of Justice but may be prosecuted by commission staff members, after review by the Office of Criminal Reference and approval by the Commission. 27a/

A. Related Criminal Provisions

Indictments are not limited to violations of the various securities laws. Defendants are often additionally charged with mail fraud, 28/ wire fraud, 29/ violation of the federal false statement statute 30/ and perjury and subornation of perjury. 31/ Usually the indictment will also allege that the defendants "aided and abetted" the commission of the crime. 32/

26/ United States v. Karger 439 F.2d 1108 (C.A. Mass. 1971); United States v. Hetherington 279 F.2d 792 (C.A. Ill. 1960).

27/ 18 U.S.C. Sec. 401 provides that a court of the United States shall have the power to punish by fine or imprisonment, at its discretion, contempt of its authority, for example "/d/isobedience or resistance to its lawful writ, process, order, rule, decree, or command." Fed. R. Crim. P. 42(b) requires that except for contempts committed in the actual presence of the court, all criminal contempts shall be prosecuted upon notice and hearing, and in essence, gives a defendant most of the rights he has in an ordinary criminal case.

27a/ Consideration should be given to following the contempt referral with a criminal reference report relating to the underlying substantive violations.

28/ E.g. United States v. Sampson 371 U.S. 75 (1962); United States v. Sanders 415 F2d 621 (5th Cir. 1969); United States v. Crosby 294 F2d 928 (2nd Cir. 1961).

29/ 18 U.S.C. 1343 E.g. United States v. Goldberg 401 F2d 644 (2nd Cir. 1968); United States v. Crosby 294 F2d 928 (2nd Cir. 1961).

30/ 18 U.S.C. 1001 E.g. United States v. Simon 425 F2d 796 (2nd Cir.) See also United States v. Powell SEC Lit. Release No. 2754 (SDNY 1963) use of fraudulent document in SEC administrative hearing.

31/ 18 U.S.C. 1621 - 22 E.g. United States v. Wolfson 437 F.2d 862 (2nd Cir. 1970).

32/ 18 U.S.C. Sec. 2, sometimes termed the federal "principal-accessory rule," states:

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Almost every SEC prosecution will involve a conspiracy count. 33/ A conspiracy count is often invaluable. Declarations of co-conspirators made in furtherance of the conspiracy are admissable against all persons who by independent evidence are proven to be a member of its conspiracy. 34/

In this regard, there has been some confusion on the application of the Bruton rule. 35/ Bruton concerned the admission of an out of court confession made by one defendant which incriminated a co-defendant and therefore should have been excluded. It does not apply to conversations by co-conspirators in the course of and in furtherance of the conspiracy. 36/

B. Reference Procedure

In practice, after the staff completes an investigation, and makes a determination that criminal prosecution is warranted, a criminal reference report is prepared by the attorneys who have conducted the

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33/ 18 U.S.C. Sec. 371. See, e.g., United States v. Peltz, 433 F.2d 48 (2d Cir. 1970); United States v. Dallago, 427 F.2d 546 (D.C. Cir. 1969); Abrams v. United States, 327 F.2d 898 (D.C. Cir. 1964); United States v. Guterma, 281 F.2d 742 (2d Cir.), cert. denied, 364 U.S. 871 (1960); United States v. Sweig & Voloshen, 316 F. Supp. 1148 (S.D.N.Y. 1970); cf. Hammerschmidt v. United States, 265 U.S. 182 (1924); Haas v. Henkel, 216 U.S. 462 (1910); United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958); Goldstein, Conspiracy to Defraud The United States, 63 Yale L.J. 405 (1959). See also Swaffield v. United States, 403 F.2d 666 (9th Cir. 1968); United States v. Dardi, 330 F.2d 316 (2d Cir.), cert. denied, 379 U.S. 845 (1964); United States v. Guterma, 189 F. Supp. 265 (S.D.N.Y. 1960); United States v. Pope, 189 F. Supp. 12 (S.D.N.Y. 1960); United States v. Ultrasonic Corp., SEC Lt. Release Nos. 1443 (D. Mass., May 18, 1959) & 1497 (Oct. 1, 1959); United States v. Schluter, SEC Lit. Release No. 1083 (S.D.N.Y., March 26, 1957); 3 Loss 4133.

34/ E. g. US v. Calaro 424 F.2d 657, US v. Etheridge 424 F. 2d 951 (1970); see also 4J Wigmore evidence 1079 (3rd ed 1940).

35/ Bruton v. United States 391 US 123 (1968).

36/ E.g. Haynes v. United States 415 F.2d 347 (1969). It has even been held that statements of co-conspirators, since deceased, may also be used against the defendant. United States v. Weber 437 F.2d 327 (1970).

investigation and such report and the evidence supporting it is then reviewed by the Office of Criminal Reference. If that office is satisfied that the case is appropriate for criminal prosecution and there is sufficient evidence to prove a case, a recommendation is made to the Commission that the case be referred to the Department of Justice. After the case is referred, the Criminal Division of the Department of Justice reviews it. 37/ If the Justice Department decides to prosecute, it then decides which local United States Attorney will be asked to handle the case and what recommendations will be followed.

Staff members familiar with the case generally actively assist the U.S. Attorney's Office in grand jury presentation, the preparation for and conduct of the ultimate jury trial and preparation of appellate briefs. When the Department of Justice and the U.S. Attorney cannot provide the necessary manpower, occasionally SEC attorneys have been allowed to actively participate in 38/ or actually conduct the trial. 39/

II. When Appropriate

Due to limited manpower and funds, our criminal enforcement program must be geared to attain the maximum enforcement impact with the relatively limited number of criminal cases that we can effectively develop and prosecute. As a general rule, the staff should concentrate on: (1) individuals associated with organized crime 39a/

37/ This review is conducted by the Securities Unit within the Fraud Section of the Criminal Division of the Department of Justice. However, in cases involving organized crime, it should be noted that the reference goes directly from the Commission to the Organized Crime and Racketeering Section of the Department of Justice.

38/ See e.g. United States v. Wall, 384 F.2d 788 (10th Cir. 1967).

39/ See e.g. United States v. Chappell, SEC Lit. Release No. 4212 (SD Ind. 1969).

39a/ It should be noted that for the last several years the SEC has attempted to give top priority to cases involving elements of organized crime. Organized crime matters are defined as all illegal activities falling within the jurisdiction of the Commission engaged in by members of criminal syndicates operative throughout the United States and all illegal activities within the jurisdiction of the Commission engaged in by known associates and confederates of such members. It is imperative that possible involvement of organized crime in Commission cases be brought to the immediate attention of the Division of Enforcement. One reason of course is that the reference will receive the highest priority. In addition the Office of Criminal Reference and Special Proceedings maintains constant liaison with the Organized Crime and Racketeering Section of the Department of Justice, and because of this relationship, may be in possession of information which may be invaluable for a successful prosecution of organized crime figures.

(2) individuals who can best be described as the "chronic violator"; (3) promotional schemes which at particular times pose the most significant threat to investors; and (4) cases involving corruption of a SEC staff member or other government agent. 40/

At various times certain types of schemes present more of a threat to investors than others. Among the more flagrant types of promotional activities or schemes which have been significant enforcement problems have been boiler-rooms, mortgage frauds, savings and loan frauds, phony charitable promotions, "ponzi-type" schemes, and "insider" schemes. 41/ In addition, certain geographical areas may present particular problems because of lack of local regulation or enforcement.

40/ E.g., United States v. Abrams, 327 F.2d 896 (D.C. Cir. 1964) (bribes of legal assistant to SEC Commissioner) (defendants subsequently plead guilty); United States v. Sweig & Voloshen, 316 F. Supp. 1148 (S.D.N.Y. 1970), (alleged perjury and conspiracy to defraud SEC and other federal agencies through illegal "influence peddling" accomplished through misuse of facilities and offices of the Speaker of the House). The Administrative Assistant of United States Senator Hiram Fong was recently indicted for bribery in an attempted fix of a current SEC organized crime prosecution. Wall St. J., Jan. 14, 1971 at 1. col. 3. See also United States v. Peltz, 433, F.2d 48 (2d Cir. 1970) (alleged bribe of SEC employee with services of prostitutes in return for revealing "inside" information regarding a forthcoming SEC civil injunctive action against Georgia Pacific Corporation. The SEC employee was indicted for perjury); United States v. Weiner, SEC Lit. Release No. 4275 (S.D.N.Y., April 7, 1969); United States v. Graber, 123 F.2d 307 (2d Cir. 1941) (prosecution of former SEC attorney for bribing the telephone operator in an SEC Regional Office to intercept and divulge information relating to a pending SEC investigation).

41/ E.g. Kroll v. United States, 433 F.2d 1282 (5th Cir. 1970) (guaranteed mortgages and trust deeds); United States v. Wagner, 416 F.2d 558 (9th Cir. 1969), cert. denied, 397 U.S. 923 (1970) (guaranteed mortgages and trust deeds); United States v. Mahler, 363 F.2d 673 (2d Cir. 1966) (boiler room scheme); Farrell v. United States, 321 F.2d 409 (9th Cir. 1963), cert. denied, 375 U.S. 992 (1964) (guaranteed mortgage and trust deeds); United States v. Ross, 321 F.2d 61 (2d Cir.), cert. denied, 375 U.S. 894 (1963) (boiler room scheme); United States v. Arzi Bank, SEC Lit. Release Nos. 4185 & 4186 (S.D.N.Y., Dec. 18, 1968) (avoidance of credit restrictions through use of Swiss banks).

By virtue of the "chronic violator" approach we will continue to concentrate on chronic securities law violators individually as "targets", in an attempt to prosecute them and their co-schemers whenever new violations can be proved, even though such violations may not currently present a significant enforcement problem. 42/

Focusing on individuals involved with organized crime is in keeping with the national policy of vigorous prosecution of the crime syndicate.

Although a specific rule cannot be laid down from which you can determine when a case should be criminally prosecuted, several important criteria can be pointed out: (1) The number and type of investors defrauded as well as the total amount of money they lost is always important; (2) The culpability and the background of the proposed defendants must be considered; (3) Because many of our criminal cases are complex and must be tried to a lay jury a certain amount of jury appeal is necessary; therefore, cases in which persons, frequently retired and elderly, have been fleeced of their life's savings or their only means of livelihood will naturally make better criminal cases than situations in which prosperous businessmen have taken a speculative flyer and been defrauded; (4) The applicable statute of limitations must always be kept in mind; the older the

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42/ E.g., United States v. Hayutin, 398 F.2d 944 (2d Cir.), cert. denied, 393 U.S. 961 (1958). See also United States v. Bilotti, 380 F.2d 619 (2d. Cir.), cert. denied, 389 U.S. 944 (1967); United States v. Abrams, 357 F.2d 539 (2d. Cir.) cert. denied, 384 U.S. 919 (1966); United States v. Dardi, 330 F.2d 316 (2d Cir.) cert. denied, 379 U.S. 845 (1964); United States v. Guterma, 281 F.2d 742 (2d. Cir. 1960); United States v. Birrell, SEC Lit [illegible] Release No. 3897 (S.D.N.Y., Jan. 2, 1968); United States v. Guterma, 1[illegible] F. Supp. 265 (S.D.N.Y. 1960); United States v. Guterma, 179 F. Supp. 420 (S.D.N.Y. 1959).

violations are, the most difficult it will be to present a case to the grand jury and obtain an indictment within the five-year Statute of Limitations; 43/ (5) It is usually unwise to criminally prosecute a case for the purpose of establishing a new legal precedent. However, in order to deter the fraudulent activities of the more sophisticated violator, prosecutions for violating provisions normally not utilized in criminal prosecutions should always be considered.

III. Content of Criminal Reference Report

In drafting a criminal reference report the functions it must serve should be considered. It essentially serves two functions: (1) It serves as the basic means for the independent review of the case by your supervisor and later by the Office of Criminal Reference and the Department of Justice to determine whether the case is appropriate for criminal prosecution,

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43/ The standard as to what constitutes unreasonable delay constituting a denial of the sixth amendment guaranty of the right to a speedy trial is well set forth in United States v. Stein et al. 456 F.2d 844 (1972). The Stein case involved an SEC prosecution 10 years from the last transaction and 6 years from the return of the indictment. The court stated: "Speedy trial questions must be analyzed by examining four factors: (1) length of the delay (2) reason for the delay (3) prejudice to the defendant and (4) waiver by the defendant. United States ex rel Solomon v. Marcusi, 412 F2d 88, 90 (2nd Cir.) cert. denied, 396 U.S. 936 (1969), followed in e.g. United States v. Fitzpatrick 437 F2d 19, 26-27 (21 Cir. 1970).

The court denied that defendants were entitled to a reversal. "The absence of substantial prejudice and appelants failure to seek an early trial bar assertion of a speedy trial claim in this instance when there is nothing to show purposeful or oppresive delay on the part of the government. Pollard v. United States 372, U.S. 354 at 361; United States v. Persico 425 F2d 1375, 1385 (2nd Cir.), cert. denied, 400 U.S. 869 (1970); United States v. Aadal 407 F2d 381, 382 (2nd Cir. per curiam) cert. denied 395 U.S. 967 (1969).

However, in jurisdictions which have adopted some variation of the 2nd circuit six month rule, the U.S. Attorneys Office must be ready for trial within that time period i.e., 6 months from indictment. Unless delay is caused by the defendants, the case must be tried within the set time period or it will be dismissed.

See Barker v. Wingo, 11 CrL 3174 (1972) where the Supreme Court recently held that a defendant's claim that his right to a speedy trial has been violated must be determined by a "balancing" test that takes into account the length of delay between arrest and trial, justification for the delay, the defendant's assertion of or failure to assert his right to speedy trial and prejudice to the defendant caused by oppressive pretrial incarceration, impairment of his defense and pretrial anxiety and obloquy.

whether many of the factors mentioned are present in the case; and whether there is sufficient competent evidence so that a criminal conviction can reasonably be anticipated. (2) The report serves as an outline for the presentation of the case to a grand jury and in many cases as a trial brief at the trial of the case. However, because members of the staff who conducted the investigation may not be available when the case ultimately comes to trial, it is necessary to include in the criminal reference report, or in appendices to it, many facts obtained in the investigation which may not be directly relevant to the Government's direct case but which may become crucial for cross-examination or rebuttal purposes.

If it is contemplated that a staff member who participated in the investigation may have to be a witness in the ultimate trial of a case, this staff member should not participate in the writing of the criminal reference report. This directive is to avoid having the staff member be subjected to possible cross examination pertaining to aspects of the criminal investigation with which he would not be familiar. It is quite obvious that in this situation, the ends of justice would not be served.

Criminal reference reports should contain the following sectipns:

A. OUTLINE OR TABLE OF CONTENTS

B. THE INVESTIGATION

C. SUMMARY OF CASE (5 TO 9 PAGES)

   1. Persons involved

   2. Statutory provisions or rules violated

   3. Factual summary of over-all scheme

   4. Significance to Commission's enforcement objectives

D. STATEMENT OF FACTS

   1. History of companies involved

   2. Details of scheme to defraud

   3. Efforts to impede the investigation

E. THEORY OF SUBSTANTIVE VIOLATIONS AND PERSONS CHARGEABLE THEREWITH

F. ANTICIPATED DEFENSES AND REBUTTAL THEREOF

G. HISTORY, DESCRIPTION AND EVALUATION OF KEY PERSONS

H. ADDITIONAL INVESTIGATION REQUIRED

I. JURISDICTION

J. VENUE

K. RECOMMENDATION

L. RELEVANT COMMISSION FILES

M. APPENDIX: EXHIBITS

N. OTHER MATTERS

O. SUMMARY MEMORANDUM TO THE COMMISSION

A. OUTLINE OR TABLE OF CONTENTS

A criminal reference report must effectively present the case to the Justice Department and U.S. Attorney assigned to prosecute the case. Since he will be completely unfamiliar with the facts when reviewing the report, a detailed outline or table of contents at the beginning, containing appropriate page references to each important topic and subtopic, will be an invaluable aid for him to understand how each facet of the case fits into the over-all scheme.

B. THE INVESTIGATION

This section shall contain the following subsections:

1. Title of the case;
2. Period under investigation;
3. Securities involved; and
4. Commission employees participating in the investigation.

C. SUMMARY OF CASE

The summary should contain the following subsections:

1. persons involved
   a. proposed defendants;
   b. why other possible defendants should or should not be considered for prosecution;
2. statutory violations;
3. summary of over-all scheme; and
4. significance of case to Commission's enforcement objectives.

1. Persons Involved

The names of persons involved in the scheme should be set forth indicating whether they are proposed defendants or not. (This should be a brief statement with detailed background of those persons appearing under the History, Description and Evaluation of Key Persons section of the report.) Although a person may be culpable, his testimony may be necessary in order to convict the principal violators. Accordingly, consideration must be given when you are writing the report as to who are necessary witnesses and who are proposed defendants.

In addition participants in the scheme or conspiracy may be in a position to testify about statements made by one or more co-conspirators during the existence and in furtherance of the conspiracy or scheme. Although this would be an admission against the speaker, it would also be allowed into evidence against all the conspirators as admissions, by virtue of a classic exception to the hearsay rule.[44] Accordingly, consideration should be given to whether the witness should be named as a co-conspirator but not as a defendant. In some cases you may wish to merely recommend the principal violators as proposed defendants, leaving the determination as to the status of other persons until after the grand jury presentation. When the staff anticipates that the grand jury investigation will develop additional evidence sufficient to indict others, such persons should be treated in the criminal reference report under the category "possible additional defendants."

To assist in locating any of these persons, as well as for positive identification during the grand jury presentation or the trial, the full name, known aliases, date and place of birth, current home and business addresses and telephone numbers, social security number, etc. of each proposed defendant, possible additional defendant, co-conspirator and other key persons should be included in the "History, Description and Evaluation of Key Persons" section of the report. (See infra.)

2. Statutory Provisions or Rules Violated

The statutory violations should be cited both to the securities act and to the U.S. Code. Similarly, rule violations should be cited to the Code of Federal Regulations. Typical violations that may be covered in a criminal reference report include:

a. Section 5 of Securities Act, 15 U.S.C. 77e;
b. Section 17 of Securities Act, 15 U.S.C. 77q(a);
c. Section 10(b) of Exchange Act, 15 U.S.C. 78j(b);
d. Mail Fraud: 18 U.S.C. 1341;
e. Fraud by Wire: 18 U.S.C. 1343;
f. Conspiracy: 18 U.S.C. 371;
g. Perjury: 18 U.S.C. 1621;
h. False Statements: 10 U.S.C. 1001; and
i. Obstruction of Justice: 18 U.S.C. 1505

3. Factual Summary of Over-All Scheme

The summary of the over-all criminal scheme should be a three to six page recapitulation of the total case, including (1) the amount purchasers invested and the amount each proposed defendant received; (2) a short chronology of the important events, identifying the issuers, the issuance and distribution of the securities, any mergers, the formation and objectives of the conspiracy or scheme; (3) the techniques utilized e.g. to manipulate the market or to effectuate the illegal distribution; (4) the principal "masterminds" of the scheme, and the role of each of the proposed defendants.

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[44] See cases cited in footnote 33-36

4. Significance to Commission's Enforcement Objectives

Here the report should point out whether the case involves an individual involved with organized crime or a securities law violator who has appeared in a number of criminal investigations but who has never been successfully indicted or convicted; whether the activities involved encompass a type of promotion that constitutes a current nationwide or regional problem that should be immediately curbed; or whether investors have been defrauded of large sums of money. This may aid in obtaining early consideration by the Department of Justice and an early presentation to the grand jury.

D. STATEMENTS OF FACTS

This section should contain a detailed discussion of the total criminal case. It should include the following three subsections: (1) history of companies involved; (2) details of scheme to defraud; and (3) efforts to impede investigation. The statement of facts, to the extent possible, should be narrative (complete but not unduly wordy) and chronological.

Each statement should be supported by a citation to evidence uncovered in the staff's investigation, whether testimonial or documentary. Every key fact should be supported by either a reference to the exact witness (and page numbers to a transcript, if any) or document through which the fact will ultimately be introduced into evidence at trial. With respect to documentary exhibits, if the investigative envelopes have been used as is strongly recommended, the report does not have to include the identity of witnesses through whom each document may be offered into evidence or where and from whom the original can be obtained if the staff has obtained copies of the document since all this information should appear on the face of the investigative envelope.

The importance of footnoting each key statement cannot be over-emphasized. References to supporting evidence are essential since the reference report should serve as the basis for a trial brief. They are also essential to enable the Department of Justice and Office of Criminal Reference to make a meaningful review.

1. History of Companies Involved

In describing the companies whose securities were illegally distributed, the following areas of information are pertinent:

a. Name, date and state of incorporation, principal offices or places of business;

b. Any parents, subsidiaries, affiliates, etc.;

c. Nature of business;

d. Officers, directors, promoters, and respective shareholders;

e. Capitalization, including number of shares issued and outstanding, whether or not offerings were registered, any exchange listings, publicly or privately held, etc.;

f. Nature of recent securities offerings, whether an underwriter or selling group was used, etc.;

g. Financial condition of the company;

h. Interrelationships with other companies or persons involved in the report; and

i. Any prior difficulties with the Commission or any other legal body, etc.

2. Details of Scheme to Defraud

In relating the scheme, it is particularly important to be thorough in providing names, dates, and locations of all meetings at which the proposed defendants discussed the scheme. The report should contain the five W's (who, what, where, when and why) of every event described. The scheme should be related factually, and in detail just the way it will have to be presented at trial, not in a conclusory manner.

Although reports of investigation will differ not only in details but to some extent in format depending upon the nature and scope of the scheme, the following areas, among others, may be involved and merit discussion in a particular scheme:

a. Nature of arrangement to manipulate the stock by virtue of phony pink sheet quotations, painting of the tape, etc.;

b. Consummation of phony mergers in order to issue free stock to insiders;

c. Fraudulent aspects of an underwriting or other public distributions;

d. Purchases or sales by insiders without disclosing relevant facts;

e. Scheme utilized to "free-up" insider stock (such as phony letters);

f. Nature of the arrangement with intermediate brokers to distribute the stock into the market;

g. Nature of the retailing effort, including pay-offs, guarantees against loss or to repurchase, misrepresentations, omissions, or other fraudulent courses of business;

h. Techniques utilized to dry up or restrict the floating supply (such as delayed deliveries, etc.);

i. Tracing of monies (pledges, loans, checking accounts, etc.); and

j. Any other pertinent aspects of the conspiracy or scheme.

Probably the most important facts that will convince a jury to convict a securities law violator is "motive" evidence, i.e., proof that the defendant obtained substantial profits as a result of his criminal acts. Thus, tracing of funds from the sale of the stock through various middlemen, banks, etc. back into the hands of the proposed defendants is extremely important.

Often in a criminal SEC prosecution, the use of detailed charts are necessary. These charts should accompany the criminal reference report but should not be included in the report. You should indicate in the report who will testify as to those facts (usually the person under whose supervision the detailed schedules were prepared).

This type of format is preferred for several reasons: (1) It will not burden the United States Attorney with unnecessary detail on his initial reading of the report; permitting him to more quickly get an over-all picture of the case, (2) If the detailed schedules, rather than a conclusionary discussion or summary charts distilled from the detailed schedules were included in the report, and the person who prepared them is to be a witness, there is always the possibility that some court might turn over the entire criminal reference report to the defense, even though the witness had merely worked on that one section and 18 U.S.C. Sec. 3500 clearly would not require such whole-sale production.

These observations are similarly applicable to the detailed accounting analysis which is required but too frequently not made in almost every case. This should not be included in the report but should accompany the report. However, the author should utilize the accounting analysis freely in writing the report.

3. Efforts to Impede Investigation

It is important to describe any efforts employed by the proposed defendants to impede the staff's investigation. These facts may be admitted into evidence at the trial to show willfullness or that defendants had guilty knowledge of the crimes committed and attempted to impede the investigation in order to prevent the crimes from being detected and prosecuted.

Efforts to impede the Commission's investigation may fall in the following areas, among others:

a. Threats to witnesses;

b. Subornation of perjury;

c. Perjury, or submission of false documents;

d. Evading service of process (including flight to foreign countries, etc.);

e. Suggestions to witnesses to plead the Fifth Amendment, to leave out part of their story, to "hedge," etc.;

f. Securing counsel for witnesses in order to control the legal advice given to them;

g. Bribes or pay-offs;

h. Strategy meetings for the purpose of directing people to conceal evidence, destroy documents, etc.; and

i. any other act designed to conceal the detection of the crimes.

E. THEORY OF SUBSTANTIVE VIOLATIONS AND PERSONS CHARGEABLE THEREWITH

In this section each violation should be pointed out briefly, and which defendants are chargeable with each violation. In this section of the report the staff should interpret the facts, draw appropriate inferences and conclusions and very briefly relate their theory of why the facts presented constitute criminal violations of the appropriate statutory provisions.

F. ANTICIPATED DEFENSES AND REBUTTAL THEREOF

Two of the most frequent defenses interposed by defendants in our cases are lack of knowledge that statements were false or reliance upon other as to their truth, and claim of an exemption from registration requirements of the Securities Act. These, and other anticipated defenses, must be rebuted in the report. For example, indicate the particular exemption from the registration requirements upon which the defendant may rely and briefly indicate how that defense will be rebutted.

Evidence or testimony which tends to exculpate the defendant should be pointed out. These items may have to be turned over to the defendants pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). The burden is on the government to produce these items *even if the defendants did not request them*. Discovery after trial could result in reversal.

G. HISTORY, DESCRIPTION AND EVALUATION OF KEY PERSONS

The report should relate all background information known to the Commission concerning the proposed defendants and possible additional defendants. Pertinent information should also be listed concerning key witnesses. Whether or not a person cooperated fully in the staff's investigation is important. Any traits or other facts that may detract from a person's value to the government as a witness should be exposed. Accordingly, any criminal record should be set forth as well as connection with other investigations.

H. ADDITIONAL INVESTIGATION REQUIRED

If the case requires additional investigation either by the grand jury or the staff, the areas that should be investigated must be pointed out. At times investors' questionnaires are relied upon in writing the report (*a practice which is disapproved*) and it will be necessary to call in the investors prior to indictment to establish the full extent of the misrepresentations made. Also, the staff may not believe the testimony of some witnesses, and the report may point out that such witness may testify more truthfully and fully before the grand jury, thus helping to "break" the case.

I. JURISDICTION

The constitutional basis of all the federal securities statutes is the use of interstate facilities or the mails. The particular "Jurisdictional means" relied upon most frequently in SEC criminal cases are: (1) the mails; (2) an interstate telephone call or other interstate wire facility; and (3) the facilities of a national stock exchange. 45/

45/ United States v. Re, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964), appears to be the only case in which specialists on a national securities exchange were criminally convicted under the federal securities laws for illegally manipulating a securities issue in which they specialized, in breach of their fiduciary duty to maintain a fair and orderly market. Re conclusively established that the floor of a national securities exchange is a means of communication in interstate commerce sufficient to satisfy the jurisdictional requirements of both the 1933 and 1934 Acts. See also Brooklyn Manhattan Transit Corp. 1 SEC 147, 173 (1935).

Use of the Mails

The most traditionally pleaded jurisdictional basis for a criminal violation of the securities laws is the confirmation of sale mailed by a broker-dealer or other seller to the purchaser. 46/ In a broker-to-dealer sale, the purchasing broker's reconfirmation to the selling broker will be sufficient. 47/ Other mailings occasionally relied upon are delivery of a stock certificate 48/ or other security interests, 49/ a market letter, progress report, or other literature describing a security being offered or sold, 50/ the mailing of a buyer's check to the seller 51/ or the mailing of the purchaser's check by the seller's bank for clearance, 52/ the mailing of annual reports or proxy solicitation materials to shareholders, or returning the proxy to the issuer, and the mailing of filings, such as a registration statement or an annual report on form 10-K, to the SEC or a stock exchange. 53/

With regard to fraud charges, in determining whether a particular mailing provides sufficient jurisdiction, the differences between a securities fraud offense and a mail fraud charge should be noted. Essentially, the mail fraud statute 54/ outlaws use of the mails for the purpose of executing a scheme to defraud. 55/ Consequently, the mailing must be a central part of, and not merely incidental to the scheme. The securities fraud statute, 56/ however, is designed to outlaw fraudulent schemes in the sale of securities, 57/ and any use of the mails to this end, even though incidental or collateral, will confer jurisdiction.

46/ E.g., United States v. Hayutin, 398 F.2d 944 (2d Cir. 1968); United States v. Kopald-Quinn, 1 SEC Jud. Dec. 371, 373 (N.D. Ga. 1937), aff'd, 101 F.2d 628, 630, 632-33 (5th Cir. 1939).

47/ See, e.g., United States v. Wolfson (Continental Enterprises), 405 F.2d 779 (2d Cir. 1968).

48/ United States v. Goldberg, 401 F.2d 644 (2d Cir. 1968); United States v. Steffes, 226 F. Supp 51 (D. Mont. 1964).

49/ Roe & Stratoray Oil, Inc. v. United States, 316 F.2d 617, 620-21 (5th Cir. 1963).

50/ United States v. Crosby, 294 F.2d 928 (2d Cir.), cert. denied, 368 U.S. 984 (1961)

51/ United States v. Robertson, 181 F. Supp. 158 (S.D.N.Y. 1959).

52/ Little v. United States, 331 F.2d 287 (8th Cir. 1964).

53/ U.S. v. Simon, 425 F.2d 796 (2d Cir. 1969) cert. denied 397 U.S. 1006 (1970)

54/ 18 U.S.C. Sec. 1341.

55/ See, e.g., United States v. Sampson, 371 U.S. 75 (1962); Pereira v. United States 347 U.S. 1 (1954).

56/ 15 U.S.C. Sec. 77q(a)

57/ See, e.g., Little v. United States, 331 F.2d 287 (8th Cir. 1964); United States v. Sanders, 266 F. Supp. 615 (W.D. La. 1967), aff'd, 415 F.2d 621 (5th Cir. 1969); United States v. Birrell, 266 F. Supp. 539 (S.D.N.Y. 1967).

It cannot, however, be assumed that collateral mailings which would satisfy the jurisdictional requirements of section 17(a) necessarily will be sufficient for purposes of section 5 of the 1933 Act. Judge Herlands aptly pointed out in United States v. Robertson, 58/ that the mailing of checks by defendants after they had obtained them from victims would be part of a scheme to defraud and would satisfy the jurisdictional requirements of section 17(a), but would not meet the jurisdictional requirements of section 5. This results from the express language in section 5 that the jurisdictional facilities must be used either "to sell" 59/ or "for delivery after sale" 60/ of, the securities. 61/

Section 15b(4) of the Securities Exchange Act enacted in August 1964 eliminates the requirement that the mails, means of interstate commerce and communication or the facilities of the national securities exchange be used for the purpose of violations of the Securities Exchange Act, where the prohibited acts were committed by registered brokers or dealers or persons acting on behalf of such a registered broker or dealer. Accordingly, a registered broker or dealer or a person acting on behalf of such broker or dealer may be prosecuted for violating, for example, Section 10 and Rule 10b-5 of the Securities Exchange Act even though the mails, etc. were not utilized in committing the violation.

J. VENUE

A special provision in the Securities Act (which is incorporated by reference in the Trust Indenture Act) states that criminal proceeding "may be brought either in the district wherein the transmittal of the prospectus complained of begins or in the district wherein such prospectus is received." 62/ The other acts provide that any criminal proceedings may be brought "in the district wherein any act or transaction constituting the violation occurred." 63/

It has been held however that these special criminal venue provisions are optional and that the Government may also lay venue in accordance with the general provision in the Criminal Code. Section 3237 of Title 18 of the United States Criminal Code is the governing venue provision. This section provides:

58/ 181 F. Supp. 158 (S.D.N.Y. 1959), aff'd in part and rev'd in part, 298 F.2d 739 (2d Cir. 1962).

59/ Section 5(a)(1), 15 U.S.C. Sec. 77e(a)(1).

60/ Section 5(a)(2), 15 U.S.C. Sec. 77e(a)(2).

61/ See also Schillner v. H. Vaughan Clarke & Co., 134 F.2d 875, 876.

62/ Sec. Act. Sec. 20(b); Trust Indenture Act Sec. 322(a).

63/ Sec. Exchange Act Sec. 27; Holding Co. Act Sec. 25; Investment Co. Act Sec. 44; Investment Advisors Act Sec. 214.

Sec. 3237 Offenses Begun In One District and Completed in Another

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> "Any offense involving the use of the mails, or transportation in inter-state or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

Accordingly, offenses involving the use of the mails or inter-state transportation may be prosecuted in the district where the use of the mails or transportation was initiated, through which it passed, or the district where the mails were delivered or where the transportation ended. 64/

Venue for the prosecution of cases involving the filing of false registration statements, Regulation A Notifications, broker-dealer applications, Annual Reports on Form 10K, etc. is in the district where the particular filing was made. Cf. *United States* v. *Travis* 64a/ 364 U.S. 631 (1961). This is true whether the violation is prosecuted under Section 32 of the Securities Exchange Act (false statements relating to filings required to be made under that Act) or under 18 U.S.C. 1001 (other statements made to the Commission including false Regulation A filings). In this connection it should be noted that the registration statements and applications for broker or dealer registration are filed in the Headquarters Office in Washington, D.C.

64/ But see *United States* v. *Cashin*, U.S. 281 F2d 669 (CA, 2, 1960) where the court affirmed the transfer of the case from the Southern District of New York to the Southern District of Alabama although the indictment and the bill of particulars did not reveal any use of the mails or other jurisdictional facilities in Alabama. The court ruled that the crimes alleged had "begun" and "continued" and thus were "committed" there even though the necessary jurisdiction usages occurred later in New York City. Hence, the court found that venue could properly be laid in that district under 18 U.S.C. Sec. 3237(a).

64a/ However Travis has been distinguished in some later cases to be limited to the statute there involved. *United States* v. *Elmer Ruehrup*, 33 F.2d 641 (C.A. 7, 1964); *Imperial Meat Company* v. *United States*, 316 F.2d 435 (C.A. 10, 1963); *United States* v. *Flaxman*, 304 F. Supp. 1301 (D.C.N.Y., 1969). These cases provide that venue is governed by 18 U.S.C. 3237.

while forms 10K, 8K, 10Q and definitive proxy statements for listed companies are filed with the national securities wxchange on which the stock is listed and with the Headquarters Office. However, companies whose stock is not listed on an exchange but which are required to file these reports by reason of Section 12(g) of the Securities Exchange Act, adopted in 1964, file these reports in the Headquarters Office.

Accordingly, with these factors in mind the criminal reference report should recommend where venue is to be laid and the reasons for this recommendation. If jurisdiction and venue are based upon the use of the mails or the means of interstate transportation or communication, these uses should be specially set forth, identifying the material mailed or transported.

K. RECOMMENDATION

This section will merely state that the report be submitted to the Department of Justice for consideration respecting the submission of the matter in the Grand Jury.

The report should be dated, signed by the staff members who conducted the investigation and signed as approved by the Regional Administrator.

L. RELEVANT COMMISSION FILES

Perhaps the most important subsection is the listing of relevant Commission files. Herein should be presented a compilation of the titles and appropriate file numbers of every Commission file (public, private, investigatory or otherwise) that contains any information whatsoever relative to the particular illegal distribution of securities involved or the background of the proposed defendants and co-conspirators. Such files may be extremely pertinent when preparing for cross-examination at the ultimate trial.

M. APPENDIX: EXHIBITS

The appendix will contain a Key to Exhibits and thereafter serially all the exhibits, each one in a properly labelled "investigative envelope."

N. OTHER MATTERS

Other matters which should be included in the criminal reference report include pending or contemplated civil litigation between the SEC and the defendants (parallel proceedings) and possible immunity problems arising out of bankruptcy proceedings (Section 7a(10) of the Bankruptcy Act) and proceedings held by a Securities Investor Protection Act (SIPC) trustee. 65/ Any other unusual characteristic of the case should be noted, e.g., the first prosecution under a statute, or unusual questions of law which are presented.

65/ See attached appendix.

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O. SUMMARY MEMORANDUM TO THE COMMISSION

After the criminal reference report has been completed, a summary memorandum to the Commission should be prepared and attached thereto. This memorandum should contain a brief summary of the case (three to five pages) and proposed jurisdiction and venue.

This memorandum will expedite the forwarding of the criminal reference report to the Commission and further expedite the Commission's referral of the report to the Department of Justice.

WLTimmeny
DPDoherty
RRyan

APPENDIX A

Pending or Contemplated Civil Litigation

If SEC civil litigation is pending or contemplated against defendants or proposed defendants involving the same basic facts as contained in the reference report, or if a third party action is pending (e.g. trustee in bankruptcy or other government agency etc.) this should be mentioned in the criminal reference report so as to promptly alert the U.S. Attorney to any possible "Parrott" problems.

Parallel proceedings are not improper per se. "It would stultify enforcement of federal law to require a government agency such as the FDA invariably to choose to forgo recommendations of a criminal prosecution once it seeks relief or to defer civil proceedings pending the ultimate outcome of a criminal trial." U.S. v. Kordel 397 U.S. 1, 11 (1969).

The danger is that the court may find that the prosecution through the SEC civil proceeding improperly availed itself of liberal civil discovery devices to obtain evidence for subsequent criminal prosecutions. U.S. v. Parrott 248 F. Supp. 196.

It is not enough that the defendant is advised of his rights under the Fifth Amendment. The court takes cognizance of considerations of justice and fair play. If the defendants are warned that they are subjects of a criminal referral and are advised of their rights under the Fifth Amendment, they appear to be adequately protected. They may either plead the Fifth Amendment or apply for an order staying the taking of depositions until disposition of the criminal trial. The government may also ask for a stay order until completion of the criminal case. See U.S. v. Stiffies 35 FRD 24 (1964). See also Perry v. McGuire 36 FRD 272 wherein the court issued a stay order where defendants in private action for conspiracy to defraud were co-defendants in criminal prosecution.

In an action brought by a third party trustee in bankruptcy the court stated: "The fact that additional testimony thereof becomes available to the government is merely the natural by-product of another judicial proceeding and to that extent it might be 'discovery' but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of appelle's." U.S. v. Simon 373 F.2d 649 at 654 (2nd Cir. 1967). However, if it appears that the government has unfairly used civil discovery even in third party civil litigation, the criminal case may be dismissed or the evidence suppressed. See U.S. v. Rand 308 F. Supp. 1231 (ND Ohio 1970). The warnings in U.S. v. Kordel 379 U.S. 1 at 11-12 must be kept in mind. "We do not deal here with a case where the government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in a civil proceeding that it contemplated the criminal prosecution nor in a case where the defendant is without counsel or reasonably fears prejudice for adverse publicity or other unfair injury nor with any other special circumstances that may suggest the unconstitutionality or even impropriety of the criminal prosecution."

Because the problem of "parallel proceedings" is a most sensitive area of law, the Division of Enforcement requests that if civil litigation is pending or contemplated against proposed defendants, it should at the earliest opportunity be brought to the attention of the Office of Criminal Reference and Special Proceedings.

Bankruptcy and Immunity

The Bankruptcy Act contains certain provisions for the granting of automatic immunity. The reference report should therefore note whether bankruptcy proceedings have commenced or are imminent. This will alert the U.S. Attorney to potential problems which might arise as a result of "use" immunity which automatically attaches to the testimony of a bankrupt given at the first meeting of creditors. 1/ Use immunity does not preclude prosecution for an act testified to if the government can establish that its evidence was developed without any use of the witness' testimony. However, the government has the heavy burden of affirmatively establishing that its evidence is derived from a source wholly independent of the bankrupt's testimony. 2/ The constitutionality of "use" immunity has been decided affirmatively.

Thus it can be seen that "use immunity" which provides for immunity from the use of the compelled testimony and the evidence derived therefrom, is narrower in scope than "transastional immunity" (which had been previously required) which provides for immunity from prosecution for any offenses to which compelled testimony relates.

The Department of Justice has recognized the potential problems which might result from the "use" immunity provisions of the Bankruptcy Act and has set forth various guidelines as follows:

The Bankruptcy Division of the United States Courts has agreed to recommend the following procedures to bankruptcy referees in handling criminal referrals in bankruptcy proceedings:

(1) In criminal referrals based upon evidence or leads not directly or indirectly obtained from the testimony of the bankrupt, the existing referral procedures will be followed.

(2) In any case in which the bankrupt testifies and a criminal investigation is underway or is anticipated, the bankruptcy referee will order that no one shall have access to the transcript of the bankrupt's testimony without first identifying himself and signing an appropriate record reflecting that he has requested and been granted access to the transcript. Adoption of this procedure will assist the government in showing any subsequent criminal proceeding that the prosecution did not have the benefit of a review of that portion of the bankruptcy record.

1/ 11 USC 25 (a)

2/ In Kastigar v. U.S., 406 U.S. 411 (1972), the court stated that "The burden of proof which we reaffirm as appropriate is not limited to a negation of taint, rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

(3) In addition, in any case in which the bankrupt testifies and a criminal investigation is underway or is anticipated, the bankruptcy referee will appropriately advise trustees, receivers, creditors, attorneys, and other persons who heard the bankrupt's testimony that, immunized testimony of the bankrupt.

(4) In any instance in which the only evidence of criminality is developed in the bankrupt's testimony, the referee will refer the case to the United States Attorney for possible criminal investigation without making reference to any information based directly or indirectly upon the bankrupt's testimony. The United States Attorney will request the Federal Bureau of Investigation to conduct a limited investigation, possibly including a review of available books and records and the bankrupt's schedules, to determine whether there is independent evidence upon which a criminal investigation may be predicated.

(5) When the bankrupt is a corporation, bankruptcy referees will consider the feasibility of clearly designating an individual not suspected of criminal conduct as the person to represent the bankrupt under 11 U.S.C. 25(b), thus possibly avoiding a grant of immunity to a prospective criminal defendant.

Thus members of the staff should isolate themselves from the bankruptcy proceedings in matters where criminal investigation is underway or is anticipated.

The criminal reference report should also note whether a SIPC trustee has been appointed or is expected to be appointed, as testimony of the bankrupt taken by a court appointed SIPC trustee pursuant to 11 USC 25(a) would also result in use immunity for the bankrupt.

WLTimmeny
DPDoherty
RRyan

A 239
DEFENDANT
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

AE

QUESTION 93

Describe your Commission's relation with the Department of Justice on the litigation process. How are requests or recommendations to litigate initiated (from whom and to whom)? Is there a permanent liaison, communications or coordination process? Describe. Are your Commission's requests or recommendations usually followed? List all instances where such requests were not followed in the past five fiscal years. State reasons given. Does your Commission have an input in the preparation for trial or appeal of a matter? Describe the extent and manner of such input. Describe any instances in which your Commission has been deprived of an opportunity of making its views known to a court. Evaluate the quality of representation of your Commission by Department of Justice personnel with particular regard to the question of whether the expertise of the Commission has been adequately reflected in the presentation of specialized matters of particular Commission concern.

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I. SUMMARY

The Commission's relation with the Department of Justice on the litigation process may be categorized into the civil and criminal areas. In both areas, the relation is generally satisfactory to the Commission.

In the civil area, the Commission is virtually autonomous, except that it may not conduct its own litigation before the Supreme Court independently of the Solicitor General. In all federal courts, the Commission customarily initiates civil litigation; in Supreme Court cases, the Solicitor General has exercised final discretion. There is close coordination between the Commission's attorneys and those in the Solicitor General's Office in Supreme Court cases and normally the Commission's counsel will orally argue the case. In lower federal court cases, the Commission litigates independently. The Commission's recommendations as to initiating Supreme Court review are not always accepted by the Solicitor General and differences as to the handling of cases sometimes arise. The quality of the Solicitor General's representation in Supreme Court litigation is normally of high quality.

In the criminal area, the Commission also typically initiates requests to litigate, through the criminal referral process. The Commission's input in preparation for litigation is extensive; indeed, the subsequent efforts of the Justice Department may be unnecessarily duplicative. The Commission's Branch of Criminal Reference of the Division of Enforcement provides a permanent liaison with the Justice Department. During the fiscal years 1970 through 1974, the Commission referred for prosecution by the Justice Department 211 cases; during those years, 160 indictments resulted. The quality of representation by the Justice Department in cases referred by the Commission for criminal prosecution is usually good, although the quality varies from district to district.

II. LIST OF CHARTS OR TABLES

Chart I - Extent to which Commission recommendations have been followed

III. LIST OF ATTACHMENTS

Not Applicable.

IV. TEXT OF RESPONSE

A. Introduction

The following response discusses the Commission's relations with the Justice Department in connection with both civil and criminal litigation. The focus is on existing procedures for coordination between the two agencies and input by the Commission. Felt inadequacies in the Commission's substantive authority to litigate are not discussed here, although many of the following comments on duplication and coordination between the two agencies are integral to any consideration of that issue as well.

B. The Commission's general relations with the Justice Department

The Commission's relations with the Department of Justice in the litigation process may be broadly divided into the civil and criminal areas.

In civil litigation the Commission is autonomous, except in United States Supreme Court litigation. In Supreme Court cases in which the Commission has an interest, the Solicitor General of the United States, not the Commission, has final discretion to determine the necessity and propriety of filing petitions for writs of certiorari, to authorize participation as amicus curiae and to approve positions which the Commission advocates. The Commission's relations with the Solicitor General have been generally very good.

In civil actions in the United States District Courts and Courts of Appeals the Commission litigates independently of the Justice Department, except that in actions where the Commission or its employees are defendants, the Justice Department, if served, requests a report of the Commission's activities. Also in cases where the Commission is sued under the Freedom of Information Act, 5 U.S.C. 552, the Commission sometimes consults with the Department so that a uniform government position will be followed.

In the criminal area, the Justice Department has total authority in the litigation process. Independently of the Department, however, the Commission engages in investigations which may lead to criminal indictment and prosecution. Following investigations, the Commission refers appropriate cases to the Department and makes available its assistance in preparation for trial, and sometimes handles appeals. The Commission's relations with the Justice Department in this context are generally satisfactory.

C. Initiation of requests to litigate and the Commission's input in preparation

In the area of civil litigation, the Commission conducts lower federal court cases independently. In Supreme Court litigation, the Commission typically initiates requests for litigation.

Whenever the Commission contemplates any appearance before the United States Supreme Court, coordination with the Solicitor General's Office is extremely thorough. The Commission can appear before the Supreme Court as appellee, appellant or as amicus curiae. However, before the Commission may petition for a writ of certiorari as appellant or before it may file a brief as amicus curiae, it must first obtain permission to do so from the Solicitor General. In such cases, the Commission's Office of General Counsel forwards the proposed petition or brief to the Solicitor General and requests his permission to file the petition or brief with the Supreme Court. The Commission's draft may be edited, substantively modified or completely refused by the Solicitor. ~~Difference~~ Deference is given by the Solicitor General to the Commission's comments on changes made. When the Solicitor General approves a final draft, his name appears on the finished documents to give evidence that the Department of Justice authorizes its content. In most cases the Commission's General Counsel's name also appears on the documents to indicate his approval. When the Commission is brought to the Supreme Court as appellee, the communication process is the same except that the preliminary step of obtaining Justice Department approval of the Commission's appearance pro se is unnecessary.

In the area of criminal litigation, the Commission usually initiates requests for litigation. Members of the staffs of the Division of Enforcement and the Commission's regional offices conduct in-depth and often time-consuming investigations into probable criminal activity. These investigations consist of the collection, organization and analysis of documentary and oral evidence. Upon the conclusion of this process a written report is prepared. Generally this report contains a detailed presentation of the facts supported by reference to the proof, a discussion of the theory of the case, a section on the applicability of relevant law to the facts in the context of criminal liability, an analysis of the strengths and weaknesses of the case, the witnesses and possible defenses, and a recommendation as to whom the Commission should seek indictments against.

This report, known as a criminal reference, is thereafter reviewed at increasingly higher supervisory levels within the Commission. At each of these review levels the report and recommendation is considered by persons of increasing experience and authority who may determine whether further investigation or legal analysis is necessary, whether proposed defendants should be added or deleted, and whether further pursuit of this report should be made at all. Finally, the Commission itself, on the recommendation of its General Counsel, must approve the staff's recommendations that the report and underlying evidence be referred to the Department of Justice. After this approval the Division of Enforcement's Branch of Criminal Reference forwards the recommendation and evidence to the Department.

After the referral process, although the Department of Justice assumes complete authority over the litigation, the Commission has a continuing interest in the matter. In almost all cases the Department of Justice requests the assistance of those members of the Commission's staff who have investigated the case, are familiar with the facts, statutory provisions, and legal principles involved. These persons participate and assist in the grand jury presentation and in any subsequent legal proceeding. They also stand ready to provide assistance to any Assistant U. S. Attorney who requires help in the drafting of documents relating to the effects of the securities laws, and in appeals in criminal cases the Government's briefs are on many occasions prepared by Commission attorneys under supervision of the Commission's Office of the General Counsel.

D. Permanent liaison with the Justice Department

In the civil area the procedure for liaison between the Commission and the Department of Justice varies depending upon whether a matter is before a United States District Court, a United States Court of Appeals, or the United States Supreme Court. When the Commission is being sued in a United States District Court, the Federal Rules of Civil Procedure require that the Department of Justice, the appropriate United States Attorney and the Commission all be served with copies of the summons and complaint. In those situations, it is the customary practice for the Justice Department to advise the Commission in writing that it has received a copy of the complaint and that it assumes the Commission will comply with routine procedure by conducting its own defense. When the Commission litigates before a Court of Appeals as appellee, appellant or as _amicus curiae_ it conducts its own litigation without communicating with the Department of Justice. Of course _ad hoc_ exceptions are made when the nature of the matter to be litigated requires coordination with another government agency.

In the criminal area, the Branch of Criminal Reference of the Division of Enforcement is charged with maintaining a relationship with the Department of Justice for the purpose of (1) reviewing criminal reference reports prepared by the Commission's regional offices, (2) making recommendations, with the General Counsel's Office, to the Commission with respect to such reports, and (3) transmitting such reports to the Department of Justice upon approval by the Commission. The criminal reference reports are prepared by the Commission's staff, either at its own initiative or, where some indication of interest has been shown, by a prosecutor. In certain instances, upon the request of a prosecutor, and upon the concurrence of the Branch of Criminal Reference and the General Counsel's Office and with the approval of the Commission, the Commission will refer its files to a prosecutor, without recommendation.

While the Commission for the most part has found satisfactory the way in which the Department of Justice has prosecuted the Commission's criminal cases, the Commission believes such cases could be handled even more efficiently if the Commission attorney most familiar with the case were to have significant prosecutorial responsibilities. This approach has been very successful in the context of the Commission's criminal contempt cases. In particular, the Commission's effectiveness in criminal prosecution would likely be increased if the Attorney General were normally to appoint a designated Commission attorney as a Special

Assistant United States Attorney, to assist in grand jury investigations and any resulting trials. It is now customary for a Commission attorney to be assigned to a case at the inception of the investigation and to remain with it through all resulting enforcement actions. As a result, a given Commission attorney is thoroughly familiar with the legal theories and factual details of each case.

As an alternative to that approach, a Commission staff member could be appointed as a special prosecutor, at least for grand jury investigations. Such an appointment would enable the staff member most familiar with the case to hear the responses of witnesses as they are given and immediately follow up with additional questions.

E. Extent to which Commission recommendations have been followed

In the past five fiscal years the Solicitor General has only once denied a Commission request to file petition for writ of certiorari to the Supreme Court. In that case the Solicitor General's Office concluded that the case was not ripe for Supreme Court review since litigation on the merits was still pending in a lower court. In other cases emphasis on specific arguments has not always been made as Commission counsel would have preferred.

The following chart sets forth a summary of the Commission's criminal enforcement program and indicates the extent to which the Department has followed Commission recommendations during the past five years:

Chart I - Extent to which Commission recommendations have been followed

iscal ear	Number of cases referred to Justice Dept.	Number of indictments[1]	Defendants indicted	Convictions[2]
1970...	35	36	102	55
1971...	22	16	83	89
1972...	38	28	67	75
1973...	49	40	178	83
1974...	67	40	169	81
1975...	88	*	*	*

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[1] A number of the cases referred particularly in recent years are still being processed by the Department of Justice. Accordingly, some of the difference between the number of cases referred and the number of indictments returned is attributable to the necessary delay between reference of the case and the return of an indictment.

[2] The number of convictions in a particular year may exceed the number of persons indicted in that year because convictions in certain cases were obtained in a later year.

*/ These figures will be supplied as supplemental information.

Addendum to Page 93-16

A 256

This covers the information to complete Chart I, whi

we noted would be supplied as supplemental information.

Fiscal Year	Number of cases referred to Justice Dept.	Number of indictments	Defendants indicted	Conviction
1975...		53	198	112

The Commission is unable, at this point, to list individual instances in which requests for criminal prosecution were not followed. A review of the Commission's index to its files indicates that in the last 5 fiscal years there have been approximately 25 instances in which Commission recommendations to the Department of Justice for criminal prosecution were rejected, either in whole or in part. It would require an examination of each of the files involved to determine the extent to which the Commission's recommendation was not followed and whether any reasons were given for the decision by the Department of Justice.

F. Quality of representation by the Justice Department

In civil litigation before the Supreme Court, the assistance provided by the Solicitor General's Office has usually been excellent. The quality of representation in cases of criminal prosecution is generally good; the quality varies widely, however, depending on the United States District in which the case is handled.

G. Conclusion

The Commission's relations with the Justice Department in the areas of civil and criminal litigation are good, largely because existing procedures for coordination and input by the Commission are adequate, and the quality of Justice Department's overall representation is satisfactory to the Commission. Where it does not have exclusive authority to litigate, the Commission provides the Justice Department with all possible assistance. In turn, the Justice Department is generally cooperative and responsive to the Commission's recommendations. That process of cooperation could be further fostered by the appointment of a Commission attorney as a Special Assistant United States Attorney in connection with each criminal case referred to the Justice Department.

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

AG - [illegible]

A 259

[illegible]

Securities
and
Exchange Commission

[illegible]

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QUESTION 92

Is your Commission's current litigation authority adequate to fulfill its mission? Be specific.

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I. SUMMARY

The Commission believes that its litigation authority is generally adequate to enable the Commission to fulfill its statutory responsibilities. There are, however, possible gaps and shortcomings in specific areas of the Commission's litigation authority, and there has been suggestions that might more effectively empower the Commission to protect investors and the public interest.

II. LIST OF CHARTS OR TABLES

Not Applicable.

III. LIST OF ATTACHMENTS

Not Applicable.

IV. TEXT OF RESPONSE

A. Introduction

Although the Commission's litigation authority is for the most part adequate, the response below notes certain areas in which it might be expanded. It also points out suggestions that have been made with regard to the Commission's authority to conduct administrative proceedings. The response also includes suggestions for changes in procedural requirements.

B. Supreme Court Litigation

The Commission is authorized to institute civil actions in the lower federal courts both to enjoin acts or practices which constitute or will constitute a violation of the federal securities laws or any rule or regulation thereunder, and to require compliance with subpoenas issued by the Commission. The Commission is not authorized, however, to conduct litigation in the United States Supreme Court independently of the Solicitor General.

While serious and delicate considerations as to the independence of federal regulatory agencies are raised when the Solicitor General, an officer of an executive department, is in a position either to prevent an agency from filing papers in the Supreme Court or to alter both the form and substance of any papers which are submitted, the Solicitors General have consistently treated the Commission's views with great deference and usually have permitted the oral arguments on behalf of the Commission to be presented by the Commission's own attorneys. Accordingly, the Commission has not felt it necessary to urge that it be completely independent of the Solicitor General in its litigation in the Supreme Court.

C. Criminal Prosecutions

With regard to the Commission's authority to prosecute criminal violations, Section 20(b) of the Securities Act of 1933, 15 U. S. C. §77(t)(b), is typical of analogous provisions throughout the federal securities statutes:

> The Commission may transmit such evidence as may be available concerning such acts or practices (which constitute or which will constitute a violation of this title) to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Securities Act of 1933, Section 20(b), 15 U. S. C. §77t(b). 1/

1/ See similar provisions in Section 21(e) of the Securities Exchange Act of 1934; Section 18(f) of the Public Utility Holding Company (Footnote continued following page)

A willful violation of the federal securities laws is a criminal offense for which the violator may be fined or imprisoned, or both.[2]

While we have found generally satisfactory the way in which the Department of Justice has prosecuted our criminal cases, we believe they could be handled even more efficiently if the Commission attorney most familiar with the case were to have significant prosecutorial responsi-

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1/ (Footnote continued from preceding page) Act of 1935; Section 321 of the Trust Indenture Act of 1939; Section 42(e) of the Investment Company Act of 1940; Section 209(e) of the Investment Advisers Act of 1940.

2/ *See* Section 24 of the Securities Act of 1933; Section 32 of the Securities Exchange Act of 1934; Section 29 of the Public Utility Holding Company Act of 1935; Section 325 of the Trust Indenture Act of 1939; Section 49 of the Investment Company Act of 1940; Section 217 of the Investment Advisers Act of 1940.

bilities.[3/] The Commission's attorney may have obtained his familiarity with the case through participating in the investigation and sometimes by preparing an injunctive action concerning the same matters. Generally, in criminal contempt cases brought on behalf of the Commission, the Commission's attorney does play a leading role with excellent results. The Commission's effectiveness in criminal prosecution would likely be increased if the Attorney General were normally to appoint a designated Commission attorney as a Special Assistant United States Attorney, to assist in grand jury investigations and any resulting trials. It is now customary for a Commission attorney to be assigned to a case at the inception of the investigation and to remain with it through

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[3/] As a matter of policy, the Commission authorizes its staff to cooperate fully with the staff of the prosecutor. Though the practice varies according to the U.S. Attorney involved, Commission lawyers are sometimes appointed to assist in the presentation of cases to the grand jury and the trial of criminal cases in court.

all resulting enforcement actions. As a result, a given Commission attorney is thoroughly familiar with the legal theories and factual details of each case. If that attorney cannot participate directly in the trial or grand jury proceeding, the benefits of his familiarity with the case may be in large part lost to the prosecution.

At a minimum, it should be the normal procedure for a Commission staff member to be appointed as a special prosecutor, at least for grand jury investigations. Such an appointment would enable the staff member most familiar with the case to hear the responses of witnesses as they are given and immediately follow up with additional questions.

D. Injunctions and Administrative Proceedings

The Commission believes that its current statutory authority to seek injunctions is unduly restrictive. The following statutes authorize the Commission to bring actions to enjoin violations of the various acts involved: Section 20(b) of the Securities Act of 1933, 15 U. S. C.

§77t(b); Sections 21(d) and (e) of the Securities Exchange Act of 1934, 15 U. S. C. §78u(e); Section 18(f) of the Public Utility Holding Company Act of 1935, 15 U. S. C. §79r(f); Section 321(a) of the Trust Indenture Act of 1939, 15 U. S. C. §77uuu(a); Section 42(e) of the Investment Company Act of 1940, 15 U. S. C. §80a-41(e); and Section 209(e) of the Investment Advisers Act of 1940; 15 U. S. C. §80b-9(e).

Section 20(b) of the Securities Act of 1933 is typical of the various provisions cited above:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the United States District Court for the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts of practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. * * * 15 U.S.C. §77 t(b).

While the analogous provisions of the other statutes are similar, the Investment Company Act of 1940 and the Investment Advisers Act of 1940 permit the Commission to seek an injunction whenever it appears that any person "has engaged" in a violation, in addition to "is engaged, or is about to engage."

Where it exists, the requirement that the Commission demonstrate that a person "is engaged, or is about to engage" in a violation, presents an obstacle to enforcement of the federal securities laws. Many courts assume that a past violation demonstrates the likelihood of a future violation. Some courts do not accept this proposition, however, and where a violation has stopped, other proof of likely future violations may be difficult. Accordingly, the Commission recommends that the language used in the 1940 statutes be substituted for that in the comparable section of the Securities Act, the Securities Exchange Act and the Public Utility Holding Company Act.

It has been suggested that it would be desirable for the statutes administered by the Commission be amended to permit the imposition of civil fines as an additional sanction in injunctive actions brought by the Commission and in Commission administrative proceedings. While the Commission has never determined to seek such jurisdiction, it is considering the possibility of doing so. In a report issued in June 1972, the Commission's Advisory Committee on Enforcement Policies and Practices specifically recommended that the Commission give consideration to the desirability and practicability of employing money penalties or fines as an additional sanction in Commission administrative proceedings. It was suggested that the availability of money penalties would, in certain situations, provide the Commission with substantially greater flexibility in fashioning a suitable remedy in administering proceedings, particularly those involving broker-dealers. In December 1972, the Administrative Conference of the United States adopted recommendation No. 72-6, which recommended the use of civil money penalties by federal administrative agencies.

Fines are, and have for many years been, a type of sanction employed in proceedings against broker-dealers by the various self-regulatory organizations. Similarly, Section 6(b) of the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463 (1974), permits the Commodity Futures Trading Commission to assess, after a hearing, a civil penalty of up to $100,000 for each violation of the Act.

Authorization for courts to impose civil fines in connection with civil suits brought by the Commission might sometimes be useful in fashioning appropriate remedies, particularly where it is virtually impossible to identify specific persons who have been wronged so that restitution can be made to them.

It has also been suggested that it might be desirable for the Commission to be empowered in administrative proceedings to require violators to make restitution to investors, or other aggrieved persons, for losses sustained. For example, Section 14 of the recently enacted Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463 (1974), provides a procedure for administrative proceedings analogous to that of the Commission, but further authorizes orders for money damages. This Commission to date has not recommended such proposals, although further consideration will be given to them in the future.

A further limitation of the Commission's administrative proceedings, which the Commission considers inappropriate, was recently imposed by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975).

Prior to the 1975 Amendments, the Securities Exchange Act of 1934, 15 U.S.C. §78a, et seq., provided that the Commission could institute an administrative proceeding against "any person" who had committed certain acts. Under Section 15(b)(G) of the amended Act, 15 U.S.C. §78a(b)(G), the Commission may bring such a proceeding only against "any person associated, or seeking to become associated, with a broker or dealer."

The Commission believes that there should be some way that it could set forth in an administrative proceeding its views with respect to violations of the securities laws even when the violators are not part of the regulated industry.

E. Service of Subpoenas

The Commission regards the limitations in Rule 45(e)(1) of the Federal Rules of Civil Procedure, "Subpoena for a Hearing or Trial," as an undue restriction on its efforts to institute and conduct court actions to enjoin violations of the securities laws. That rule provides, in pertinent part:

> "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena: and, when a statute of the United States provides therefor, the Court upon a proper application and cause shown may authorize the service of a subpoena at any other place." (emphasis added) 4/

The underscored portion of Rule 45(e)(1) contemplates the existence of statutes which permit

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4/ 28 U.S.C. Appendix Fed. Rules Civ. Proc. Rule 45(e)(1) (1970).

a court upon application and a showing of cause to authorize the service of a subpoena "at any other place". In view of the fact that a violative activity often spans numerous states and foreign countries, the Commission believes that its efforts to enjoin such conduct would be significantly facilitated by amendments to the securities laws providing for service at any place of a subpoena compelling attendance of a witness at a hearing or trial. Because of the existing restrictions of Rule 45(e)(1), the Commission is often required to present evidence in support of a request for injunctive relief by introducing witnesses' depositions, when it would have preferred to have a witness appear in person to testify. Amending the securities laws to provide for the exception contemplated by Rule 45(e)(1) would facilitate the Commission's efforts to protect the interests of investors and the public interest so substantially as to outweigh any inconvenience to witnesses required to travel to the place of the hearing or trial.

Furthermore, there seems no reason why the Commission's subpoena power in connection with hearings and trials should be more restricted than its subpoena power in connection with investigations; the securities statutes typically permit service of subpoenas, in connection with investigations, anywhere in the United States.[5/] The power to serve subpoenas nationwide would also be consistent with the provisions for nationwide service of process in cases under the securities laws.[6/]

5/ See, e.g., Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78(u)(b), which provides in pertinent part:

> "Such attendance of witnesses and the production of any such records may be required from any place in the United States or any state at any designated place of hearing."

6/ See, e.g., Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78 aa, which permits process to be served "wherever the defendant may be found."

F. Cease and Desist Procedures

While the Commission has not concluded whether it should seek to have powers to institute cease and desist proceedings, it has been suggested that such proceedings might be appropriate. If such authority were given the legislation might provide that the Commission could seek to have a court punish by contempt violations of a cease and desist order. Such a proceeding might be utilized in situations where the Commission has reasonable cause to believe that an entity registered with it, such as a broker-dealer, investment adviser or investment company, [is about to engage in practices which are inconsistent with or violative of the governing regulatory or statutory requirements. It might also be utilized where any person is violating or has violated an applicable law, rule or regulation administered by the Commission, or where the Commission has reasonable cause to believe that such action is about to take place.] It could be provided that permanent cease and desist orders would become effective only after notice, opportunity for a hearing, and a finding by the Commission that an improper activity specified in the notice of charges had been established.

Section 8 of the Federal Deposit Insurance Act, as amended by the Financial Institutions Supervisory Act of 1966, includes authorization for the issuance of temporary cease and desist orders. Similar provisions might be useful in situations where the continuation of the unsafe or unsound practice is likely to result in the insolvency or substantial dissipation of the assets of a broker-dealer, investment adviser or investment company, or is otherwise likely to seriously prejudice the interests of customers. In such a case the temporary order would become effective upon being served upon the respondent and, unless set aside, limited or suspended by a court, would remain effective and enforceable pending the completion of the proceedings on the permanent cease and desist order.

G. Conclusion

The Commission's current litigation authority is generally adequate. We have pointed out, however, specific areas both substantive and procedural in which the Commission's authority could perhaps be strengthened or expanded. Certain suggestions are advanced for consideration, although the Commission at this [illegible] has not taken any formal position on their adoption. The Commission, however, fully supports the suggestions with respect to eliminating the geographical limitations upon subpoenas in our court actions, having our attorneys play a more important role in criminal prosecutions, and in amending the injunctive provisions of the Securities Act, the Securities Exchange Act and the Public Utility Holding Company Act to conform to those of the Investment Company Act and Investment Advisers Act.

The securities business is recognized to be an especially intricate and complex one; an increased variety of enforcement tools might increase the Commission's ability to fashion remedies consonant with offenses.

USA 33s-475
(ED. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

AH-xil

FPI-MI--9-24-75-50M-4417

QUESTION 94

Estimate the costs, if any, of duplication of effort and the costs of coordination between your Commission and the Department of Justice in the litigation process.

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I. SUMMARY

Costs of coordination between the Commission and the Justice Department, in connection with criminal prosecutions, have ranged between about $200,000 and $500,000 per year for the last five fiscal years. Costs in connection with civil litigation have been minimal.

II. LIST OF CHARTS OR TABLES

Chart I - Cost of Coordination with the Department of Justice in connection with Criminal Prosecutions.

III. LIST OF ATTACHMENTS

Not Applicable.

IV. TEXT OF RESPONSE

A. Introduction

While the Commission is aware that costs of coordination in connection with criminal prosecution by the Justice Department are substantial, precise dollar figures may be unreliable. The estimates below should be considered rough appraisals. Since duplication of effort between the Commission and the Justice Department in connection with civil litigation is minimal, no attempt at an estimate of that cost has been made.

The Commission conducts all of its own civil litigation with the exception of cases before the United States Supreme Court, which are under the supervision of the Solicitor General. Accordingly, the only areas in which there is a need for the Commission to coordinate its litigation efforts with the Department of Justice are criminal prosecutions and Supreme Court litigation. In connection with Supreme Court litigation, the

Commission has not incurred substantial costs as a consequence of coordination with the Department of Justice. The present procedure does, however, require the Commission's staff to confer with the staff of the Solicitor General to resolve any differences of opinion concerning the form and content of Supreme Court briefs.

Whenever the Commission contemplates any appearance before the United States Supreme Court, coordination with the Solicitor General's Office is extremely thorough. The Commission can appear before the Supreme Court as appellee, appellant or as amicus curiae. However, before the Commission may petition for a writ of certiorari as appellant or before it may file a brief as amicus curiae, it must first obtain permission to do so from the Solicitor General. In such cases, the Commission's Office of General Counsel forwards the proposed petition or brief to the Solicitor General and requests his permission to file the petition or brief with the Supreme Court. The Commission's draft may be edited, substantively modified or completely refused by the Solicitor

General. When the Solicitor General approves the final draft, his name appears on the finished documents to give evidence that the Department of Justice authorized its content. In most cases the Commission's General Counsel's name also appears on the documents to indicate his approval. When the Commission is brought to the Supreme Court as appellee, the communication process is the same except that the preliminary step of obtaining Justice Department approval of the Commission's appearance pro se is unnecessary.

If the Commission conducted its own Supreme Court litigation, independently of the Solicitor General, there would, of course, be no need for such consultation and, accordingly, some savings in staff time and attendant expense would be realized.

The need to refer criminal matters to the Department of Justice for prosecution imposes somewhat greater costs on the Commission. In the criminal area, the Department of Justice has total authority in the litigation process. Independently of the Department, however, the Commission conducts the investigative process which may lead to criminal indictment and prosecution. Members of the staffs of the Division of Enforcement and the Commission's regional offices conduct in-depth and often time-consuming investigations. These investigations consist of the collection, organization and analysis of documentary and oral evidence. Upon the conclusion of this process a written report is prepared. Generally this report contains a detailed presentation of the facts supported by reference to the proof, a discussion of the theory of the case, a section on the applicability of relevant law to the facts in the context of criminal liability, an analysis of the strengths and weaknesses of the case, the witnesses and possible defenses, and a recommendation as to whom the grand jury should be asked to indict.

This report, known as a criminal reference, is thereafter reviewed at increasingly higher supervisory levels within the Commission. At each of these review levels the report and recommendation is considered by persons of increasing experience and authority who may determine whether further investigation or legal analysis is necessary, whether proposed defendants should be added or deleted, and whether further pursuit of this report should be made at all. Finally, the Commission itself on the recommendation of its General Counsel considers the staff's recommendations that the report and underlying evidence be referred to the Department of Justice. After the Commission's approval, the Division of Enforcement's Branch of Criminal Reference forwards the recommendation and evidence to the Department. The Branch of Criminal Reference is the Commission's permanent liaison with the Department of Justice for particular cases referred and for the Commission's criminal enforcement program in general.

After the referral process, although the Department of Justice assumes complete authority over the litigation, the Commission has a continuing interest in the matter. In almost all cases, the Department of Justice requests the assistance of those members of the Commission's staff who have investigated the case and are familiar with the facts, statutory provisions, and legal principles involved. These persons may assist with respect to the grand jury presentation and in any subsequent legal proceeding. In addition, the Commission's General Counsel's Office often prepares briefs on appeals.

The necessity of preparing a criminal reference recommendation for Commission action, or examining the Commission's investigative files and transmitting them to the Department, and of helping to acquaint Justice Department attorneys with the facts of each case could be substantially reduced if Commission counsel were made Special Assistants to the Attorney General to conduct the grand jury proceeding and subsequent trial. To the extent that Justice Department attorneys must familiarize themselves with the facts and law of a case already well-known to Commission lawyers, who may have prepared and tried a related civil case, there is, of course, a duplication of effort.

Chart I below provides some idea of the minimum amount expended in this area over the last five fiscal years. However, because of the way in which the Commission's record-keeping system is organized, substantial additional amounts, not reflected in the table, may well have been expended in this area. Adjusting for that consideration, it would be reasonable to estimate that actual expenditures have been approximately double those shown in the table.

Chart I - Cost of Coordination with the Department of Justice in connection with Criminal Prosecutions.

Fiscal Year	Dollar Amt.	Man Years
1971	$309,959	17.5
1972	247,679	13.3
1973	176,332	13.5
1974	364,070	17.0
1975 1/	547,901	25.8
Totals	$1,645,941	87.10

1/ Pro-rated on the basis of actual figures for fiscal year through May 24, 1975.

B. Conclusion

There are substantial costs of coordination between the Commission and Justice Department in connection with criminal prosecutions. The Commission believes that, if its attorneys are familiar with the facts and were made Special Assistants much of this duplicative effort would be avoided without impairing the efficacy of the enforcement process.

A 288

USA 338 475
(ED. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

A.I-21

Response of
SECURITIES
AND
EXCHANGE COMMISSION
To
Request of the Honorable
John E. Moss, Chairman

On Behalf of
Congress of The United States
House of Representatives
Subcommittee on Oversight and Investigations
Of The
Committee On Interstate and Foreign Commerce

QUESTION 95

July 25, 1975

(The above legend appears on attached illegible photo)

QUESTION 95

Indicate the number of criminal referrals from your Commission to the Department of Justice in each of the last five fiscal years.

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I. SUMMARY

Not applicable.

II. LIST OF CHARTS OR TABLES

A. Chart I - Referrals, Indictments and Convictions.

III. LIST OF ATTACHMENTS

Not applicable.

IV. TEXT OF RESPONSE

A. Introduction

The chart below shows the number of cases referred to the Justice Department during the past five fiscal years and indicates the number of indictments, defendants indicted, and convictions resulting from such referrals.

It should be noted, in considering the figures for each year, that indictments shown for a given year may include indictments resulting from referrals in prior years. Accordingly, it would be difficult to derive a reliable ratio of indictments to referrals on a yearly basis. As noted below, certain data for fiscal year 1974 are not yet available.

Chart I - Referrals, Indictments and Convictions

Fiscal Year	Cases referred to Justice Dept.	Indictments	Defendants Indicted	Convictions
1975	90 (estimate)	not avail.	not avail.	not avail.
1974	67	40	169	81
1973	49	40	178	83
1972	38	28	67	75
1971	22	16	83	89

The above figures do not reflect the full product of the Commission's criminal investigations. In certain instances the Commission becomes aware of violations of the federal securities laws which are of a local nature, and, accordingly, the Commission may authorize the referral of the matter to the appropriate State or legal agency for possible prosecution. Typically, there are cases of activity confined to a local area, involving violations of local law, and in which a local prosecutor has expressed a special interest. In such cases, members of the staff are made available to assist the local agency. Furthermore, in order to deal with complex investigations involving organized crime in the securities business, often of national or international scope, a special unit has been established in the Division of Enforcement to maintain communications with other federal agencies and state and local law enforcement officials who have information on organized criminal activity in the securities industry.

A variety of types of fraudulent practices underlie cases which the Commission has referred to the Department of Justice for criminal prosecution.

In determining whether any particular case is appropriate for criminal prosecution, the Commission considers at least three factors; whether the potential defendants have engaged in frequent and chronic violations of the securities laws; (2) the amount of money involved; and (3) the sophistication of the victims of the fraud.

The Commission has generally been satisfied with the Department of Justice's disposition of securities cases although, naturally, the quality and diligence with which such cases are handled varies depending upon the particular U.S. Attorney's Office or Department of Justice staff members, to whom a case is assigned. In rare instances, the Department or particular U.S. Attorneys have failed to institute prosecutions in referred matters for reasons not evident to the Commission. Members of the staff of the Commission who have investigated a case and are familiar with the facts and law usually participate and assist, at the request of the Department of Justice, in the trial of referred criminal cases and in any subsequent appeals.

B. Conclusion

The Commission's referrals of criminal cases to the Department of Justice has increased steadily over the last five fiscal years. The Commission's criminal investigations also contribute to the prosecution of securities violations local in nature or involving organized crime. Although there is some variance, the Commission has been generally satisfied with the Department of Justice's disposition of referred cases.

A 294

DEFENDANT EXHIBIT AK id

A 295

JECT: ——— TDA Industries, Inc., et al. File No. NY-5092

APR 25 1977

QUEST: That pursuant to the request of the U.S. Attorney's Office for the Southern District of New York the Commission refer its investigative files to the U.S. Department of Justice and Said office for possible criminal prosecution, ~~without recommendation.~~

EXPLANATION

Date matter received at Regional Office ______________ Headquarters 21 4-28-77

son matter was not promptly forwarded to Commission for regular calendar action:

Reason matter cannot await Commission action under normal schedule:

There is an evidentiary hearing in this case scheduled for today. The indictment has already been obtained and the case has not been formally referred.

uesting Office Head

SECRETARY

Pursuant to the provisions of 17 CFR 200.41(a), the Chairman or the undersigned member of the Securities and Exchange Commission, acting as Duty Officer of the Commission, is of the opinion that joint deliberation among the members of the Commission upon the above matter is unnecessary in light of the nature of the matter, impracticable, or contrary to the requirements of agency business but is of the view that such matter should be the subject of a vote of the Commission.

Pursuant to the provisions of 17 CFR 200.42(b) the undersigned member of the Securities and Exchange Commission, acting as Duty Officer of the Commission, is of the opinion that action on the above matter is required to be taken which, by reason of its urgency cannot practicably be scheduled for consideration at a Commission meeting.

~~Chairman~~

Duty Officer Commissioner

COMMISSION ACTION

	Approved ~~As Duty Officer~~*	Approved	Deferred for Regular Calendar
rman Williams			
issioner Loomis	PALL		
issioner Evans			
issioner Pollack			

Date of Action April 25, 1977

aff memorandum requesting affirmation by the full Commission due in the Secretary's fice within three business days.

MEMORANDUM

A 296

April 25, 1977

TO: The Commission

FROM: Office of General Counsel
Division of Enforcement

SUBJECT: TDA Industries, Inc., et al.
File No. NY-5092

RECOMMENDATION:

☐ That the Commission grant access to the subject files as requested by ______

☐ That the Commission grant access to the subject files as requested by ______ with the provision that no public use of the subject files be made without prior approval.

☒ That pursuant to the request of the U.S. Attorney's Office for the Southern District of New York, the Commission refer its investigative files to the U.S. Department of Justice and said office for possible criminal prosecution, without recommendation.

ACTION REQUESTED BY:

1. The Commission in September, 1975 instituted an injunctive ☒, administrative ☐ action involving the subject and the status of said action(s) is completed with all defendants consenting to permanent injunctions.

2. Additional Comments ______

Prepared By:
DPDoherty/Assistant Director/51246
RGRyan/Branch Chief/51469
DPTennant/Special Counsel/51490

Reviewed By:
IHPicard /Assistant General Counsel/OGC-51238

in the first instance through a reference by the Securities and Exchange Commission.

THE COURT: The so-called criminal reference referred to?

MR. BENDER: That is correct. The only reason I mention that is so we can get out of the way any ambiguity that may have been inadvertently written by the Government in its answering brief.

THE COURT: I think it is an appropriate question or an appropriate suggested stipulation, and I will say in reviewing the briefs and thinking about the question and doing some research on it, I do feel it is appropriate that the Court be advised as to how it was that the office of the United States Attorney for this District was first made cognizant of these charges.

Can you enlighten me on that, Mr. Cutner?

MR. CUTNER: Yes, your Honor. I told Mr. Bender I was prepared to state my understanding of what happened. Certainly the Government does not dispute that it was the SEC who brought to our attention, that is, the office of the U.S.Attorney, the existence of the case of SEC vs.TDA Industries. It happened in the following fashion as I understand it.

Mr. Jeffrey Tucker and Donald Malowsky of the

SEC, who are the assistant regional administrator, and the associated administrative regional director, respectively, had a conversation with Mr. Wing, chief of the Securities Fraud Unit in the U.S. Attorney's office --

THE COURT: Tell me again who the SEC representatives were.

MR. CUTNER: Malowsky, the associate regional administrator, and Mr.Tucker, an assistant regional administrator,met with Mr. Wing. On December 1, 1975, Mr. Tucker of the SEC wrote a letter to Mr.Wing enclosing copies of the pleadings in the matter of SEC vs.TDA Industries. Inother words, only the documents of public record.

Thereafter -- and I do not have the precise date at the present time, your Honor -- Mr. Wing made a request of the Securities Exchange Commission to furnish him with the SEC's files in the case. That request was forwarded by the New York Regional Office to the Division of Enforcement in Washington, where it was passed along to the Commissioners of the SEC and ruled upon in favor of turning the files over to the U.S. Attorney.

This brings up a point that I wanted to clarify anyway in reading over my own papers and that is, in the case of a formal criminal reference where the SEC on its own initiative is forwarding a reference report to the

Commissioners for a decision on whether or not the case should go to the U. S. Attorney, that in my mind or in the Government's view is no different than what happened here in that it took a ruling of the Commissioners of the SEC in order to turn over the files of the Commission as opposed to the documents of public record.

To sum up, we do not dispute in this hearing that the matter came to the attention of the U. S.Attorney's office from the New York regional office of the SEC.

THE COURT: And I need not concern myself with semantic subtleties as to whether or not what took place was a "criminal reference", you make no point on that?

MR. CUTNER: I do not.

THE COURT: Does that suit your purpose?

MR. BENDER: Yes.

There is one other matter I would like to allude to. It can be deferred to later, but I issued subpoenaes to various gentlemen in the SEC, both in New York and in Washington with respect to all records and memoranda relating to what the purpose of this motion is and while I have been given, even prior to the subpoena, some of the material through Mr.Cutner's cooperation, and we have done the same thing as far as our witnesses, I would like to know if there is any additional material we have

M I L T O N S. G O U L D, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

xxx BY MR. BENDER:

Q Mr. Gould, what is your occupation?

A I am a lawyer.

Q And do you want to tell us how long you have been a lawyer?

A Forty-three and one-half years.

Q I take it you have been admitted to the bar of the State of New York?

A Yes, sir.

Q And to the bar of this Court?

A Yes, sir.

Q And with what firm are you associated presently?

A Shea, Gould, Climenko and Casey.

Q Are you a partner in that firm?

A Yes, sir.

Q How long have you been with that firm?

A Since 1964, when that firm was formed.

Q Do you know the defendants Douglas Fields and Fred Friedman?

A Yes.

Q Did you previously represent them?

A I believe that we had some business for Mr. Fields, or rather for TDA. We did some corporate work for them, I think, in 1973 or 1974.

I did not do it personally, so I am unfamiliar with the details.

Q Did you represent them in anything else?

A I represented them in 1974 in connection with an investigation that was going on in the office of the District Attorney of New York County. That was Mr. Fields, Mr. Friedman and Mr. Davis -- the three of them.

Q And --

A I say "I" -- I mean my firm represented them.

Q Can you tell us what that investigation was about, if you can recall?

A Well, I can tell you what I knew about it, what I learned from the people there.

Q Yes.

A I learned that there had been a transaction under which a block of TDA stock that was in other hands -- not in the hands of any of these people -- it was restricted stock. It became available for sale, and, to put it as succinctly as I can, they made arrangements for the sale of stock to an intermediary in circumstances where the stock came into the hands of the public.

It was sold by the original seller at a substantial discount which reflected the fact that it was restricted. Then the stock was freed up by opinions so that it passed into the hands of -- I say very loosely, your Honor -- the public -- although obviously there is more to it than that.

Q May I interrupt you, Mr. Gould, without going into more specific details, can you give us a general idea just what TDA was interested in?

A Well, I'll tell you, but I am trying to respond to your earlier question, Mr. Bender.

There was a very substantial increase in price between the sale by the restricted owner and the sale by their designated intermediary to the public brokerage firm, and I learned that the allegation was made that Messrs. Fields, Friedman and Davis had participated in the profit, and there were a lot of other facts, but that was the core of the thing, and the District Attorney's office was investigating this to determine if there were offenses under the laws of the State of New York.

Q And were there any other transactions that they were also looking into -- just generally?

A Yes, there were some finder's fee transactions

-- I am a little hazy about that now but they were certainly present.

There was some talk about the possibility of prosecution under the State Income Tax laws.

There were other peripheral matters but the central transaction was the one I have described.

Q Was the corporation, TDA and Westcalind represented in the DA matter, if you know?

A Well, certainly I did not undertake to represent Westcalind. There was no need to find who was acting for them. I suppose in the sense that I was acting for the principal actors in the transaction, I may have had a professional responsibility to TDA at that level.

Q Well, did you know Herbert Kantor, the attorney?

A I knew him, but he had nothing to do with the transaction at that time when it started.

Q You mean when it started?

A That is correct.

Q But sometime subsequently did he come in on the scene?

A Yes, and at sometime -- and I cannot fix the time, but I am sure he can refresh my memory -- Judge Streit and I -- Judge Streit and one of my partners who was associated with me in the matter, we felt that the interests of

TDA required that they be separately represented. We advised Messrs. Fields and Friedman certainly that TDA ought to have separate counsel, and they designated Mr. Kantor.

Q Did the DA investigation reach a point where you were made aware of the outcome of that investigation?

A Yes, sir. In the beginning of January of 1975 -- I will give you the date as precisely as I can based on a reference to my diary --

Q By the way, with respect to your diary, did you make that available to Mr. Cutner before you testified?

A Yes, sir, and to you and to anybody else.

Q Thank you.

A (Cont'g) -- I should say simply for the record, your Honor, I made it available to the extent that it contains references to this matter. Of course I do not want to disclose everythign that is in it because a lot of it is privileged information.

THE COURT: I quite understand.

A (Cont'g) If I may simply refresh my recollection from the papers I have here I will tell you when that was.

(After examining) On about -- not "about" but on January 9th Saul Streit and I had a talk with Mr. Driscoll of the District Attorney's Office, and Mr. Driscoll had in front of him certain memoranda of our previous conversations with him and others, I think.

Q What year was that, January 9th -- when?

A 1975 -- '75 -- and he told me in substance that his office had concluded that the transactions in question were not cognizable offenses under the State laws.

Q What if anything did you do thereafter concerning the matters that had been investigated by the DA?

A On the following day Judge Streit and I conferred with Messrs. Fields and Friedman and Davis --

The document I am looking at, your Honor, is an affidavit which I preprec, based on my diary entries, if anybody wants to know what it is -- and we told them what we had heard from Mr. Driscoll.

I told them -- I think I did -- that while it was pretty clear that the District Attorney's Office was not -- that is, the office of the District Attorney in New York County was not going to proceed in line with certain prior conversations that we had, I was convinced that the transaction in question would be regarded with considerable interest, to say the least, by the office of the Securities & Exchange Commission -- by the Enforcement Division of the Securities & Exchange Commission, and that I was virtually certain, although it had not been said to me in so many words, that the District Attorney's Office would refer the matter to the SEC people, and I suggested to them that I had the thought, in which my colleagues, Judge Street -- and I think Mr. Kantor -- concurred -- that if we wanted to avoid a criminal prosecution in this case under the Federal Securities' Laws, I thought it would be highly desirable that we should not wait for the referral, but that we should arrange as promptly as possible to bring this whole transaction to the attention of the SEC people. They agreed with my view, and on that same day I met -- I called Mr. Moran -- Mr. William Moran, the Regional Administrator, whom I have known for many years. I did not, I think, tell him anything about the facts in the telephone conversation but we made a date for the most convenient and the earliest possible time we could, and that was January 14th.

THE COURT: Tell me the date on which these conversations took place, Mr. Gould, that you have just described.

THE WITNESS: The conversation with Mr. Driscoll was on the 9th.

THE COURT: Yes.

THE WITNESS: The conversation with Fields, Friedman and Davis was on the 10th.

The telephone call to Mr. Moran was that same day, on the 10th, and our meeting -- our first meeting at the SEC was on the 14th.

THE COURT: Thank you.

Q You mentioned Mr. Kantor's name in connection with your January 10th meeting.

Who were present at that meeting, could you tell us again, please?

A I will have to refer to my diary, if you will bear with me a moment.

(After examining) The principals whom I have designated were present: Fields, Friedman and Davis, Judge Streit and Mr. Kantor.

It was at my office.

Q In connection with your statement to the people at that meeting at your office on January 10th, about making a disclosure to avoid a criminal prosecution, what was the basis of your knowledge and belief that such a proposal was feasible?

A The basis of my belief, Mr. Bender, was several decades of experience in handling securities' matters, matters with the Securities & Exchange Commission, in many of which there was present the possibility of a criminal prosecution.

I mean, you are asking what went on in my mind, why I did this?

Q Yes.

A Well, I'll try to answer you the best I can.

In trying to persuade an agency like the SEC, the enforcement people at the SEC that there should be no criminal prosecution, my experience has been that it turns on certain factors.

It turns, first, on a demonstration that these people are not professional securities' violators. A great deal of our experience in the early days was with recidivists -- you know, they would be in and out, and there was no use talking about no criminal prosecution with fellows who already violated Section 5 twice or three times, and so on.

So one of the ingredients of my own mental process was that these people have no history, no background in this activity.

Secondly, there has to be a demonstration to them that the people are of good faith, that they understand what they did was wrong, that it violated the law, and it seemed to me the most potent kind of demonstration that you could give would be literally to carry the case into the SEC on a silver platter, as we intended to do when I called Mr [illegible]. In other words, "Here, Mr. SEC, you haven't heard about this case, we are bringing it to you because we have studied it. We know what we think it involves, and we think we know what we want to accomplish"-- so that this voluntary disclosure to the SEC was not the act of philanthropy on my part; it was an attempt to make a demonstration to them that we were dealing with people who at least had some understanding as human beings that what had happened here was wrong, was actionable and invoked sanctions.

The third ingredient that you always -- I say "always" -- that in my experience I have always tried to offer them when I was making an effort to avoid criminal prosecution was cooperation on the part of the people, an easy access to the required evidence and information.

And the fourth and most important ingredient of my own concept of this was --

Yes, the fourth I would say, the most important, is that you, with their help, work out a solution which effects restitution to the public. In other words, you make the stockholders whole if you can.

Now after the conversation on the 10th with Fields, Friedman, Davis, Kantor, and Streit, it seemed to me that I had in my hands such a package as I had used in the past in other transactions, in successful efforts to persuade the Securities & Exchange Commission that we should concentrate on restitution and corporate reform -- and I should have included, when I said "restitution to the public," that usually it involves corporate changes, like the personality of officers, the personality of directors, the formation of committees, the introduction of new directors.

There are so many variations on this thing.

So it seemed to me we had all of these ingredients.

I said to them "I think if we go to them with a package like this we have a good chance of talking them out of a criminal prosecution."

Q Mr. Gould, could you give the Court some of the cases recently where you have had experience with the New York office of the SEC, where you worked out such arrangements to avoid a criminal reference?

2/2 A Well, your Honor, it is a little hard to do because there are so many variations on these things.

We have had broker-dealer cases where some of the people of the SEC, for example, felt that the dereliction rose to the level of criminality.

A recent case, which is a classic one because it had all the ingredients, was the Brand, Grumet & Siegel case, where I took a very firm position that since we were putting the company out of business, where there were very substantial other sanctions, but there should be no criminal prosecution, and indeed in the event there was no criminal prosecution although there was a good deal of controversy over it.

Other cases, R. H. Johnson -- that is a long time ago -- and there are a lot of them a way back.

I had a tipee case, where there was a claim of misuse of confidential information -- and that is fairly recent.

Q What about the other broker-dealer cases that you recall? Did you have many of those?

A Yes.

Q How many did you have?

A I don't know, Mr. Bender. I can't dredge those all up, but I would say you would have an average of one or two a year.

Q Did you make similar disclosures -- the approach in those cases as you did in the Fields case?

A I can't conscientiously say it was similar because I do not think it is true in any of those cases. I brought the case to them --

Q I see.

A (Cont'g) Usually my firm or I, we were not retained until the fat was in the fire, there was an investigation order or something like that, so that is a substantial dissimilarity.

Q Well, aside from the disclosure, did the SEC in New York work out an arrangement that there would be no disclosure?

A I cannot say to you that we worked out an arrangement that there would be no criminal reference. I can only say to you that I urged that the considerations that I was making available to them dictated, in my judgment, that there should be no criminal reference, and in most cases there was no criminal reference.

On the other hand I must tell you, sir, that I can think of at least two very, very recent and highly publicized cases where the minute I said -- more than two, several -- where the minute I said "No criminal reference" I was told right off that "Forget it, there is no way that we can avoid criminal action in these cases."

Q What cases were they?

A One of them was the RE case, where two very prominent and important members of the American Stock Exchange were involved.

Q He was a specialist, wasn't he?

Mr. Curran, but I am not at all sure on that now, my memory is hazy who I talked to, that this whole subject should be reviewed by someone other than that,that Assistant.

I was informed it was indeed so reviewed and that the Government determined not to proceed with the criminal prosecution.

Q After your conversations on January 10 with Douglas Fields and Fred Friedman and the others you mentioned, did you make a disclosure to the Securities and Exchange Commission?

A Oh,yes.

Q What was the date of that?

A On January 14, Mr. Kantor and I --

Q That is Herbert Kantor?

A Yes. He representing the corporation TDA and I representing the individuals, the three individuals, met with Mr. Moran and some other people. I can't remember who else was in the room. There were a number of his associates in the room and we outlined for them what we knew about the case. We had our clients' permission to do so, and wesuggested that Mr. Kantor should be in charge of furnishing them with the appropriate documentation.

They professed great interest in the matter and we arranged for Mr. Kantor to deliver packages of information to them, which I think he did, then we waited to see what would happen.

I told Mr. Moran and his associates of the investigation that had been conducted by the District Attorney's office, but in the course of a discussion, I told Mr. Moran that what my hope was in the case, what my objective was, and I think I used "laying this out for you on a silver platter", or some other rich phrase, I said my objective here is to avoid a criminal prosecution and I think if we can use that as coinage in the case, maybe we could make the stockholders whole, maybe we can get back the money that was taken or whatever profits they make coming to the stockholders. I think that is the way I phrased it. I don't remember what my words were, but certainly I was very frank with Mr. Moran and his people as to why we were doing what we were doing.

Q Was there any question about whether they had any information about this case before you came in?

A Mr.Bender, as far as I can recall, they never heard of it before. I can't remember anybody saying that to me, but I think Mr. Kantor and I discussed that and my best recollection is that we both concluded that they never heard of it before.

Knowing Bill Moran, if he knew about it, he would have told me so, I am sure.

Q Did anybody sayanything to you with respect to the primary objective that you disclosed was your proposal?

A I can't identify any words or phrases that were used. I certainly left the meeting in the belief that they were interested, that it was a case with some significance and nothing had happened in the meeting to deter me from my own professional judgment, that if we could effect the right kind of restitution and reforms, we had a good chance of getting away without a criminal prosecution.

Q Did Herbert Kantor participate in this discussion?

A Yes, sir.

Q Did there come a time when you were advised whether your proposal to avoid a criminal reference which you made on January 14, was accepted or not?

A Let me hear that again.

(Question read.)

A Mr.Bender, I have searched my memory as much as I can and I am not able to identify any words which issued from the mouth of the SEC official which translated into common work-aday English meaning we do hereby accept your proposal.

I never heard anything like that. On the contrary, I kept talking about what we were doing to avoid a criminal prosecution and nobody said to me, Gould you are crazy or quixotic or we won't have it or won't buy it. Nobody said anything like that to me, and whatever was said, whatever the interchange was between us, I certainly was of the sincere belief that we were working towards an objective. In other words, restitution, corporate reform and a lot of money coming back and the way we were going to get it was by dangling the bait of no criminal prosecution.

THE COURT: Let me ask you this, Mr.Gould, and I will quote the old popular song.

I understand from what your description about your talks about this case with the SEC is, they didn't say yes and they didn't say not, is that correct?

THE WITNESS: They said in effect, go ahead.

They never said go ahead. They didn't stop me from going ahead.

THE COURT: They didn't say yes and they didn't say no, but you have said in your prior testimony, there have been occasions in comparable situations where they have said no.

THE WITNESS: Yes, sir.

THE COURT: But you don't recall their ever having said yes?

THE WITNESS: Your Honor, I don't mean to be pontifical about this, but it would be an extraordinary relationship if they ever said to me yes. I would be nervous about it because I was a prosecutor once and I have been a kind of specialist in these matters for many years. It would be most unusual for them to say, "You got it, no criminal prosecution."

It has happened. Not in the New York office. I can't remember. I tried to remember. It has happened where they have said you got it. There won't be any criminal reference.

Q Where was that, in Washington or other offices?

A At least two cases I can think of in the Los Angeles office where one of them said to me, "You got it." At least one case in Washington. At least.

THE WITNESS: Your Honor, my memory is not what it was. There are others and I just can't identify them. I made a list as best I could. I can't go and dig 40 years' worth of files out of a warehouse.

THE COURT: What you have said helps me.

Q mr.Gould, did there come a time when you learned that the New York office had almost, if not completely, finished its investigation in the matter?

A Well, sir, there were a number of conversations that I participated in between January and June. My best recollection, sir, is that in all of those conversations, I played variations on the same tune. In other words, I kept telling them that the only way I could lead these fellows to do what I thought ought to be done here, was by holding out the prospect that thereby they would avoid a criminal prosecution. I am sure it was tiresome, but I kept emphasizing it with them.

Q When was the next meeting after January 14? Was that on February 28?

A Yes, sir. I was at a meeting on February 28. Present Tucker and Perlmutter of the SEC. Mr. Kantor, Steit and myself. I think there was one other man from the SEC there as I think about it now.

Again, I play the same tune. This is what we were talking about and their purpose was to investigate the facts and hopefully come up with a form of consent decree which would embody the provisions for restitution and provisions for the corporate changes, changes in the personality of the directors and early on -- and maybe at this meeting -- maybe at some other meeting, we had protracted discussions about the personality of Mr. Fields. They wanted restrictions on his power over the company. We conceded early on that we would probably have to have some restrictions on Fields' powers.

On the other hand, we argued, I thought convincingly, that Fields was a very important personality in the company and he couldn't be completely eliminated. I think to some extent the same was true of Friedman. We cannot make that argument about Mr.Davis because quite plainly Mr.Davis was in a different category than these two fellows. He was not an employee and in Davis' case, we did spend a good deal of time on the susceptibility of Mr. Davis to a professional proceeding, that is, the possibility, I thought almost a certainty, that the SEC would proceed against him under Rule 2E and possibly ramifications of that in other places.

So when we came to talk about sanctions in these meetings between January and June, we had to talk about Fields and Friedman, let's say in a manner slightly different than the way we had to talk about Davis. They were different. They didn't have the problem that Mr.Davis had, about his professional standing.

Q Did you subsequently have a conversation with Mr. Nortmanof the SEC?

My diary suggests to me I had a date with Mr. Nortman on Friday, April 11. I certainly was at the SEC that day and met with him. I have no present recollection of what we discussed except I know we discussed this case and every time I discussed a case with people in the SEC, I just said the same things.

Q Would you look at paragraph 9 of your affidavit and see if that refreshes your recollection as to what was the substance discussed there or in part?

A I saidin my affidavit that I had a conversation with Nortman in which I told him I wanted to discuss in detail a negotiated disposition of a matter. I have those words in quotes. I can't remember now why I put them in quotes, but I must have had a reason for it -- I know now why I spoke to Nortman. This refreshes my recollection.

The procedure in the SEC in matters of this kind is, that they have to get some kind of authority from Washington and I was a little disturbed about the delay between January and April and I believe that I tried to get somebody in authority to do whatever it was that had to be done to get them moving. I think that is what the conversation with Nortman was about.

I told him, again, I probably played the same tune, but I know now why I met with Nortman. I wanted them to facilitate the process of getting an authority on their part to talk to us.

Q In the course of your conversation, was there any reference to your plan?

A Unquestionably. There was no way anyone could talk to me about TDA or Fields and Friedman without my hitting the same notes again. It was the only thing I had to play.

Q On June 17, did you have a telephone conversation with Herbert Kantor, if you can recall?

A Bear with me, I am trying to piece things together.

Q Or did you have a conversation with Mr.Tucker on that date?

A If you will bear with me, Mr.Bender, I will try to answer.

Yes,sir. On June 17 I talked to Tucker on the telephone. I also talked with Kantor. I also talked with Fields about this matter and I think that I learned from Tucker on the17th that theSEC had received whatever kind of authority they needed. They were advanced in their own administrative stuff. I don't remember too much about it, and I certainly got the impression on June 17 that they liked the package that we were putting together. In other words, they were interested on going forward on that basis. Something like that. I don't remember the words.

Q What was your reasonable inference from the conversation with Mr.Tucker?

A Mr.Bender, apparently it wasn't reasonable. I tell you what my inference was.

Q Aside from what happened that the matter came over here --

A When we finished the conversations on June 17, I believed that I had some kind of understanding, the kind of understanding I have been making for 40 years that we would put our package together which was not going to be easy because it involved a lot of money out of these people and that if they did that, there wouldn't be any criminal prosecution -- wait a minute -- there wouldn't be any criminal reference.

I think we have fallen into a little error, you and I. You used the word "prosecution". I never use the word "prosecution." I used the words "criminal reference" because the SEC has no power over prosecutions as such. That is my understanding of the law. Only the Attorney General can make a deal that is enforceable.

Q Congress has done that also under a specific statute with the Court's approval.

A That is lately. Where I lived for 40 years in an atmosphere where we can't say say to each other you can't make a deal unless you get it in writing from the Attorney GEneral.

Q Subsequent to June 17, did you or a member of your firm or both, attempt to work out with the SEC staff a civil settlement of the matters you had discussed and which had been investigated by the SEC?

A Mr.Bender, from the 17th of June until some time in the beginning of September,I did very, very little work. I was ill and I was not very much in the office and when I was in, I had to deal with some very pressing matters.

I remember very well that all during the summer of 1975 I kept pushing Kantor, particularly, to some extent Judge Streit and to some extent Mr.Ellis of my office, who was looking after, trying to look after things while I was out that summer, I kept pushing them to get started on papers, let's see what kind of decree they want. I must have had at least one telephone conversation a week during that period, but I never talked with the SEC and I said to my own people, let's get going and if we have a deal, let's get it on paper and get the thing closed out.

All along I tried to convince them. We can't let this thing sit. If we have it, let's try to close it out. That is all I did from June 17 until September 11 or September 4. Some time in September I met with the SEC again.

Q Did you meet with them on September 4,1975?

A Yes,sir.

Q Will you tell us to the best of your recollection who was there and where was it and what the purpose of the meeting was as far as you can recall?

A I have no actual recollection of the conversations. I know I was there. My diary records I was there and in sum, what I recall about it is, we argued with Tucker and Perlmutter or both of them and maybe others, about the contents of the complaint, the civil complaint about the sections that should be invoked in the civil complaint.

Obviously they wanted a whole spectrum of SEC 33 and 34 Act violations. We were inclined to think we wanted to keep the title. I just know we had a big discussion about it on that date and my diary has a note which says, "See my notes in my diary on 9/11." I don't know when or where I put that other reference in.

On the 11th, I had a telephone conversation according to my diary with Tucker and Perlmutter, both on the phone, and they told me what it was that the SEC wanted from us.

Again, I am reading, my recollection refreshed by these unusually full entries in the diary, but I am sure they are right.

It says first of all they wanted an injunction. They wanted it to cover 5A and 5C of the 33 Act, 17A of the 33 Act. They wanted under the 34 Act, they wanted 10B5, 13A, 14B, I think it says here. That was the first thing they wanted, the injunction.

They wanted disgorgement. That was their phrase. I put it in quotes. They wanted $435,000 paid to the company representing the profit on the sale of the TDA stock through this fellow Bernardi, who was the intermediate.

Q Was that the amount they claimed that Fields and Friedman had received on these so-called transactions?

A Mr. Bender, I think that is probably right, but I have no way of telling you what they claimed. I know we had finally reached a figure of $435,000 and that probably was some kind of synthesis of what they said and what we said. It wasn't easy to do.

They wanted an additional $35,000 received by Friedman in the Eagle Roofing transaction. They wanted a "reorganization" of TDA under which Friedman and Fields would cease to be directors, that they would work under the supervision of officials who would be approved by the SEC.

The SEC wanted the approval of the substitute directors.

There was more that I don't remember. Mr. Kantor can give you more of the details on that because he actually worked on it when I passed this along to him.

As to Mr.Davis --

Q Wasn't Mr. Kantor with you on September 4?

A Yes, but what I am talking about are notes on September 11 based on a telephone conversation, and I don't think Kantor was in the room. He may have been, but I would be surprised.

Q On September 11?

A Yes.

Q But on September 4, Mr. Kantor was there?

A Yes. I wouldn't have gone without him. We couldn't talk unless the company was represented.

Q On this occasion --

A I haven't finished.

Q Excuse me.

A There was a very important thing besides. They wanted to reserve the right to give Mr.Davis under Rule 2E, they were very emphatic about that --

Q Explain what you mean.

A 2E is that rule of the SEC under which lawyers, accountants and other professionals are subject to disciplinary proceedings like disbarment.

THE COURT: Thank you, Mr. Gould.

THE WITNESS: It is a rule which is currently the subject of a case in this court.

Q On September 4, were you told in words or in substance by Jeffrey Tucker that you had no deal on your proposal or plan to avoid a criminal reference?

A No, sir.

Q Were you told that by anyone from the SEC on September 4?

A Mr.Bender, let's save time. Nobody ever said that to me, ever. No one ever said that to me.

Q Did you have any discussion on September 4 or September 11 with respect to when the complaint might be filed or what kind of procedure would be followed in connection with the complaint?

A I am hesitating because I don't remember whether it was on September 4 or September 11.

Q Was it any time before?

A There came a time when I urged, and it may have been on either of those two days, but somewhere around that time, I urged on the people in the SEC, particularly this fellow Perlmutter who seemed to be the infantry on it, doing the actual work. I said, look ,if we are going to have a deal here, if we are going to have a package, for heaven's sake, don't file the complaint without notice to us because there will be a press release when the complaint comes out and I would like to synchronize it with a release from the corporation so the company doesn't get hurt by one of these adverse press releases.

Again, Mr.Bender, I have had this conversation hundreds of times in my life. That is the normal way we do things. If the interest of a publicly-owned corporation are involved in transactions of this kind, you try to minimize the public relations impact on the corporation by having the SEC come out with its release which goes on the broad tape, you try to minimize it by having the company with some kind of -- what do you call it -- not exculpatory, but explanatory information so the public doesn't get panicked and everybody doesn't run in and sell the stock.

We have been doing this for years.

THE COURT: There is a concern in that context, I take it, not just with the targets or the potential defendants, but with the shareholders of the company.

THE WITNESS: Only with the shareholders. Normally the target people, the heck with them, you can't worry too much about them, but if you let the SEC come down with a complaint with the concomitant release and the company is off balance and nothing comes from the company, you get a kind of sauve qui peut in the market. People run to turn in their stocks. They don't know what is happening. They don't know that protective measures have been taken to prevent the company from getting hurt; so we certainly had that conversation, not once but a number of times.

Q What was the response from Mr. Perlmutter with respect to that, if you can recall?

A I don't know that I ever got a response from them because you don't have to get a response from them on a thing like this. This goes without saying that their interest is as great as mine in helping the public stockholder absorb this kind of punishment. It would be an unusual case where they didn't cooperate with me 100 per cent and this was such a case.

Q When did you find out?

A I don't remember when.

Q When was the complaint filed?

A. Much later. They took a long time to get it out.

Q Would it refresh your recollection if I told you it was September 16, 1975?

A Mr. Bender, it would refresh my recollection that it happened, but on September 16, 1975, I was experiencing the first instance of what was almost a fatal illness and while I am not in the office, I don't know, talk to other people about it. I know there was a lot of controversy about it and I know I blew my stack with this guy about it.

Q Did you have a conversation with Mr. Perlmutter either that day or the next day or around there?

A I don't remember. I know I got angry with him about something. In plain English I think he lied to me about something.

Q Did you so tell him?

A Probably, in very vigorous language.

THE COURT: Am I correct in drawing the inference that a civil complaint was filed by the SEC without the advance notice you asked for?

THE WITNESS: Yes, sir, you are entirely right about that. That is what happened.

THE COURT: I thought that was probably true.

THE WITNESS: And I saw no reason. What I said to them was, there was no reason for this urgency about it. They had been dawdling with this complaint until since the middle of June and he never really called me and told me it was going to be done. He presented that he had called my office and left word it was going to be done and by the time I got him on the phone, it had been filed and on the wire and Kantor never got a chance to use his prepared press release.

Q Did you in your conversation with him threaten him in any way?

A Did I threaten him? I probably called him some names. I probably told him what I thought of him and I probably told him if I ever got a chance to talk to anybody about his professional capabilities, I would be very glad to tell them what I thought of him.

If that is a threat, I made it. What could I threaten him with, making him a sergeant?

Q Despite this, Mr. Gould, did your office while you were ill continue on your earlier attempts to work out a negotiated civil sentence?

A I was informed while I was in the hospital and in the course of visits I got from Judge Streit, I think Mr.Fields and Mr.Friedman came to see me at least once, I was informed they were trying to work things out. I have really no recollection of what happened. I was heavily sedated during that whole period. I don't want to be responsible for anything I did.

Q Was there any period of time that you were made aware of the fact there was some great difficulty on the part of your clients to work out what the SEC insisted upon?

A Yes.

Q When did that happen?

A Right along, right along. They thought the SEC was asking for too much money. They objected to the amounts being asked for. They objected to the security provisions being asked for. They kept saying they were going to be pauperized by this thing and we argued with them that this was the best we could do.

Q How were you able to persuade them? On what basis?

A Mostly, we talked about the criminal prosecution, that we thought this was going to keep them out of the penitentiary, in plain English. I probably said that to them 50 times.

Q By agreeing to the terms they would avoid a criminal reference?

A That was my judgment. It was my judgment if they made the kind of rich deal the SEC was asking for here, there would be no criminal reference.

Q To your knowledge, wasn't that the specific reason they went along and agreed to the terms?

A You are asking me what went on in their minds. It was the reason I urged on them and they apparently accepted it. Maybe they went for some other reason.

Q Did they express that to you that that is the reason why they would do it?

A Again, in substance, yes. I urged it, they opposed it, they wriggled, I pressed and what I pressed was on the criminal prosecution and finally they agreed. I don't know what went on in their heads.

Q I want to take you back and ask you a moment, relating to your conversation that you had with Mr.Tucker on June 17. Were you ever told by Mr.Tucker or any of his colleagues or associates on this investigation that there was a change of position and the agreement not to refer to the case or the understanding not to refer the case or your belief that they wouldn't refer the case was withdrawn?

MR. CUTNER: I will object to that question, your Honor, it is compound.

A I don't understand the question.

THE COURT: We can have it reread or you can rephrase it.

MR. BENDER: If Mr. Gould says he doesn't understand it, I better rephrase it.

Q You told us you had some belief at least as the result of your conversation with Mr. Tucker on June 17th that your plan, as you had originally proposed it, seemed to be okay, is that right?

A That is the substance of it.

Q At any time subsequent to that, did Mr. Tucker or anyone else say that your belief in that respect was incorrect?

A Nobody ever said to me that my belief was incorrect.

If I may volunteer something that may be helpful.

I did in this case, in the early conversations, starting in January, and I remember I did it here. Look, we want to avoid a criminal prosecution. We will go to great lengths to do it.

THE COURT: Criminal reference?

THE WITNESS: Yes. I am falling into that area. I may have said it that way, but that is what I meant because that was the extent of their power and authority and if I say prosecution, it's looseness, it's not what I really mean.

A (continuing) I said to them, this is what we want to do. I want to get a package together. I want it so good for the company, so good for the stockholders, but, obviously, if in the course of your investigation you find other things that these fellows have done that they haven't talked to me about, all bets are off.

There is a reason for that, your Honor, because we have had that experience where we sit in a room and think we have the materials, the ingredients, then we discover the same day usually using other counsel has done this one and this one and this one and in those circumstances, you throw up your hands.

Something like that happened in the Ray case. Something like it happened way back in the R.H. Johnson case. In other words, they do something where the fellows at the SEC say we can't go on with things like this. These are recidivists. Guys that have done it five or six times.

So, that was injected into this thing and one of the objectives of the investigation that went on between January and June was to make sure that there was nothing else and one of the defendants particularly is concerned about. One of them particularly. I wasn't sure I knew the whole story.

Q Actually, the complaint was filed, the transactions reflected in the complaint.

A. Only what we had given them. I think they trickled up some minor stuff which nobody paid any attention to. It was what was over in the District Attorney's office.

Q On December 1, 1975, were you around at that time?

A I was out of the hospital and back from Florida on December 1.

Q Were you in touch with the office?

A I will tell you if you will bear with me. I will tell you where I was and what I was doing.

On December 1, I had a two and a half hour discussion at the Securities and Exchange Commission.

Q With whom did you have that discussion?

A I had several discussions at the SEC. Let me just unravel this.

I did have a discussion about TDA at 2:30, but strangely,it doesn't say with whom.

Q Would you look at Paragraph 20 of your affidavit an see if it refreshes your recollection?

A My notes are kind of garbled but I think I can get them straightened out. Do you want me to do that?

Q Everything you say is important.

A You said look at Paragraph 20?

Q. Yes.

A I know now what I did. When I prepared this affidavit, I told you that I had talked with Tucker and Perlmutter and their people that day and my memory was refreshed by Judge ~~Smith~~ Streit, who had told me what happened on that day.

Q This is on December 1, 1975?

A Yes.

Q Was Judge Streit there also on that day?

A I believe so. I am having a little difficulty because I had meetings at the SEC on other cases and they are commingled. I think Streit was there.

Q Can you tell us to the best of your recollection, the substance of what was discussed? Just generally.

A I have no recollection, sir.

Q Would you look at paragraph 20.

A I am looking at it. I know we talked about the complaint and proposed consent decree. That is all I can tell you.

Q Did Mr. Tucker tell you on that day that he or the SEC contemplated or that he actually referred the case against your clients to the U. S. Attorney's office for consideration?

A Did he tell me that? No, he never told me that. He hasn't told me that to this day. Nobody told me that.

Q Did your office subsequent to December 1st continue to negotiate with respect to the terms of the consent decree, the collateral requested by the SEC and the other ancillary receipts?

A Yes. We went right on talking with them. Judge Streight had much more to do with that than I did because I was away a good part of that month and I would have to say that any of the details of those negotiations you will get better from him than from me; although unquestionably I attended certain meetings with thepeople and I will tell you my best recollection about the meetings, it was the same old thing.

The SEC wanted more. They wanted to pay less. The SEC wanted broader terms and Kantor probably has drafts on this. They wanted narrower terms. We were haggling about a settlement and I was pressing them to come up, because as I said to them 50 times, if you don't, you are going to end up in the penitentiary.

Did you subsequently learn that the SEC referred the matter to the U.S. Attorney's office?

A Mr.Bender, I have never learned that the SEC referred the matter.

I have heard from people that the SEC did not refer the matter but I am told it got to the U.S. Attorney's office in some informal way , the way that the Brand, Grumet case came over here.

Q There has been a stipulation here that the case had been referred as of December 1, 1975.

A Youmean a criminal reference?

Q By Mr. Malowsky and Mr. Tucker to the United States Attorney's office.

A What about it?

Q Is there any doubt in your mind you had no knowledge whatever, neither you nor anybody in your office as of December 1, 1975?

A There is no doubt we had no knowledge of that.

Q If you had such knowledge, would it have made a substantial difference as to how you worked out or at least advised your clients how to work out the disposition of the matter?

A Yes, sir, there is no doubt in my mind that I would have advised them to terminate the negotiations and have nothing more to do with the SEC people.

MR. BENDER: No further questions.

THE COURT: We will break for five minutes.

(Recess.)

(continued on next page.)

End 3

THE COURT: Cross-examine, Mr. Cutner.

MR. NAFTALIS: Your Honor, before Mr. Cutner cross-examines, may I ask three or four questions?

THE COURT: Oh, I beg your pardon. I apologize to you individually and to all the defense counsel collectively.

I think it is just as well that any of those on the defense side complete their questioning before the United States attorney starts.

EXAMINATION BY MR. NAFTALIS:

Q Good afternoon, Mr. Gould.

A Good afternoon.

Q At the time in 1975 when you had these various conversations with the members and representatives of the SEC, you represented Mr. Davis, Mr. Fields and Mr. Friedman, is that correct?

A Yes, sir.

Q And at that time what was Mr. Davis' occupation?

A He was an attorney. He was a partner in a firm, and I think he specialized in corporate securities' work.

Q And in that regard a large part of his practice had to do with corporate practice before the Securities

& Exchange Commission; is that correct?

A Yes, so I was informed.

Q And if someone is proceeded against under Rule 2(e), either by consent or an adversary proceeding, he would give up his right to practice law before the Commission, is that correct?

A If the sanction imposed was disbarment.

There are also alternative sanctions. Disbarment is the most severe.

Censure is the least severe.

Then of course there are all kinds of intermediate degrees of suspension which have been invoked over these many years.

Q During the conversations that you had with Mr. Davis, when you reported to him on your conversations with those of Judge Streit, with the members of the SEC staff, did you have a conversation about the sanction of disbarment or some other sanction under Rule 2(e) being applied to Mr. Davis?

A Mr. Naftalis, since I had some of these conversations with Mr. Davis on a one-to-one basis, where just he and I were together, I assume that in your question, in putting these questions to me you have his authority to have me tell you what went on between him and me.

Q Thank you.

A He is in the room so I am assuming that there is not going to be any claim that I violated a privileged communication.

THE COURT: Is there any inhibition about that, Mr. Naftalis?

MR. NAFTALIS: No.

THE COURT: All right.

THE WITNESS: I am sorry to be captious about this, Judge, but this kind of thing has happened before.

THE COURT: Go right ahead.

Q Let me put the question: Was that topic discussed? You can answer just yes or no.

A Mr. Naftalis, yes, it was.

Q And was that a matter of concern to Mr. Davis?

A Indeed it was.

Q And as a securities' lawyer was he very reluctant to give up his rights to practice law before the SEC?

A I would have to say that the substance of what he said to me was that in one way or another he was extremely reluctant.

Q And during these conversations didyou indicate to him that it would be necessary for him to give up his right to practice law before the SEC if he was to avoid having this case referred to the United States Attorney's office?

A Yes.

Q Is it fair and honest to say, Mr. Gould, that Mr. Davis was very reluctant to go along with the consent decree that was ultimately signed?

A I don't understand your question, Mr. Naftalis. I have no judgments about what is fair and honest.

Q Based on your recollection of your dealings and conversations with Mr. Davis, was he very reluctant to go along in the total settlement that was reached with the SEC?

A Extremely reluctant.

Q Is it fair to say, based on your recollection, that he was the most reluctant of the three that you represented?

A Of the three he was the most difficult to persuade.

Q And based on your recollection is it fair to say that he was persuaded by you, or attempted to be persuaded by you, if you will, by the fact that the matter would not be referenced to the United States Attorney's Office?

MR. CUTNER: Your Honor, I have an objection. I do object to this line of questioning. I think it is proper to have it from Mr. Davis, if Mr. Naftalis wants to prove it.

THE COURT: Well, I think, Mr. Cutner, particularly in the absence of the jury, I am going to take questions and answers on the operations of people's minds, or even of other people's observations and opinions about the workings of the minds of others.

I think we have got to paint with a fairly broad brush here. I will take it.

THE WITNESS: Could I have it read, your Honor?

(Question read by the reporter.)

A I would think from my observation of him and my recollection of the conversations that that was the most potent argument that was used on him, and probably --and again from my observation that was the only argument that persuaded him to put up the money, his share of the money.

Q The only argument that persuaded him, to the best of your recollection?

A I don't know -- I think probably that is right. I don't think he reacted very well to some of the other points that I made.

MR. NAFTALIS: Thank you, Mr. Gould.

THE COURT: Anything else from the defendants?

xxx EXAMINATION BY MR. WRIGHT:

Q Mr. Gould you have testified that in September of 1975 you had a series of conferences or conversations with the defendants urging them to accept the settlement agreement which you had arranged with the SEC; is that correct?

A Which I thought I had arranged, yes.

Q Do you recall specifically having such a conference in your office on September 22, 1975?

A Yes, sir.

Q Do you recall whether on that occasion Mr. Norman Ostrow was present?

A He was present.

Q Was it your understanding that at that time he was there in his capacity as counsel to Mr. Alan Sandberg?

A That is what I understood, yes.

Q Do you have any recollection of the conference at that time?

A Independent recollection? None whatever.

THE COURT: What is the time of the conference that you are now discussing?

MR. WRIGHT: September 22, 1975.

THE COURT: All right, thank you.

MR. WRIGHT: That is all.

THE COURT: All right, Mr. Cutner.

MR. CUTNER: I gather there are no questions from Mr. Be[illegible]e's counsel.

MR. TIGHE: That is correct.

CROSS-EXAMINATION

xxx BY MR. CUTNER:

Q Mr. Gould, in your forty-three years at the bar you have devoted a good deal of your time to practice before the SEC; is that right?

A Well, I would say more accurately in practice in SEC matters --matters in which the SEC was a participant.

Q Is it fair to say that you are very familiar with proceedings before the SEC?

A I think I am, yes.

Q And you are also experienced in the defense of criminal cases, isn't that fair to say?

A I think so.

Q Particularly in SEC criminal cases?

A I think so.

Q You certainly knew in 1975 that the SEC could not give anyone immunity from criminal prosecution?

A You mean as a technical matter or as a practical matter?

Q The question is, you knew that the SEC had no power to give anyone immunity from criminal prosecution.

A I don't think that is right. I didn't know that. I knew that there was no statutory authority, but I knew that the SEC as a practical matter makes very often a decision whether there should be a criminal prosecution or not.

Q Well, you knew that the decision as to whether someone would be prosecuted was ultimately the decision for the U. S. Attorney?

A Not necessarily.

Q Well --

A I am sorry, I don't mean to fence with you, sir. I can think of many cases where no U. S. Attorney ever heard about the case in which an enormous volume of discussion was, "Should we have a criminal prosecution or not?"

Q Well, you would concede, though, that the U. S. Attorney is a person who has the authority to decide whether or not a prosecution should be initiated?

A In most cases, yes, but not necessarily. There are cases where the decision is made in the Fraud Section of the Department of Justice. When Mr. Kowassak was in charge of that, almost invariably he reviewed SEC determinations to prosecute fraud cases. It varies from administration to administration, but it is not accurate to say that the decision to proceed is made by the U. S. Attorney. It is often made -- probably most often made by the U. S. Attorney.

It is sometimes made at the level of the Criminal Division of the Justice Department in Washington. It is sometimes made at the level of the particular person in charge of the Criminal Reference Section of the Securities & Exchange Commission.

It is sometimes made at the level of the Director of the Enforcement Division. And it is sometimes made by people in the field. Mr. Kowassak wasn't the only fellow who held that job.

Q You are not saying that the SEC could prevent the Department of Justice from proceeding with a criminal case, are you?

A No way they could do it, but that is not what you asked me, Mr. Cutner. You asked me where the decisions are made.

Q And you also knew in 1975, Mr. Gould, that nobody in the New York Regional Office could bind the Securities & Exchange Commission; isn't that so?

A Yes.

Q You knew that the ultimate decision as to whether to refer a case or not to refer a case rested with the Commissioners themselves in Washington, D. C.; isn't that so?

A No, sir. I knew that the ultimate decision might be made by them but would be made on the basis of recommendations by people at the staff level.

I have seldom heard of an original review by the Commission itself of the question as to whether there should be criminal prosecution or not. It may have happened -- I don't know about that.

Q You will concede that the Commissioners are not bound by the staff recommendations?

A I concede that, and they can overrule it, but I have never heard it happen.

Q And that would be true in a criminal case, that the Commissioners would not be bound?

A I think that is probably right.

Q Is that also true in a civil case, that the Commissioners are not bound --

A Right.

Q -- by the recommendations of the staff people?

A True, they are not bound.

THE COURT: Let us go back to the United States Attorney's Office for a moment -- excuse me, Mr. Cutner.

conclusion, some recommendation, and would send the case to Washington for further study -- and that is what I envisioned.

I did not have a picture of anybody marching the case across Foley Square the way they did in the Brand, Grumet case.

Q You would concede that in 1975 if the U. S. Attorney in this District knew about this case, the TDA case, that it would be their decision whether or not to prosecute, isn't that right?

A Yes, I knew that, and I also knew that I would probably have an opportunity to use the same kind of argument that --

Q Well, your answer is that you knew it?

A Sure, I knew it.

Q Now would it be fair to say, Mr. Gould, that the last thing in the world that you wanted at that time was for the U. S. Attorney in this District to find out about the case?

A Not true. It never occurred to me. I never gave it a moment's thought.

Q You didnot go to the U. S. Attorney and seek immunity?

A I certainly did not.

Q You did not want the U. S. Attorney to learn about it?

A That isn't true. I couldn't have cared less.

Q Isn't that the whole purpose of your strategy, Mr. Gould?

A No, sir.

Q Wasn't it your strategy that if you could get the staff to go along with not recommending a criminal reference, then that would probably be the end of the case?

A Yes.

Q And you felt if the U. S. Attorney found out about the case that that might present a problem for you?

A Additional work -- not necessarily a problem.

Q It might be a problem?

A Yes, it might be a problem.

Q The U. S. Attorney might not go along with the recommendation of the staff people?

A True. It depends on who is in charge.

Q And you recognized, Mr. Gould, that this was a serious case?

A Yes, sir.

Q This was not a technical rule violation or anything of that sort.

A Correct.

Q It was, in plain language, a case of stealing, isn't that so, Mr. Gould?

A I think that's right.

Q It could very well be a criminal case?

A Mr. Cutner, I recognized from the word "go" that it was a criminal case, and everything I said I believe contributes to my express judgment that while it was not cognizable under the laws of New York, it was probably under the Securities' laws.

Q And you persist in your answer that you couldn't care less whether the U. S. Attorney found out about the case?

A I persist in my answer, sir, because at least two or three times in my life the people in the SEC have said to me, "We would like to go on this thing but we ought to discuss it with the U. S. Attorney," and we marched and discussed it with the U. S. Attorney. And if you want to hear about one, I will be glad to tell you about one like that.

Q Well, I wonder if you could hold that for your redirect.

A No -- do what you want.

THE COURT: Next questio n.

Q You say you made the judgment or urged your clients to go ahead and sign the consent to the entry of judgment in the SEC case, based on your long experience with SEC cases, is that right?

A That was one of the elements that contributed to it, yes.

Q You felt if the SEC got its pound of flesh -- a good pound of flesh, that it might be satisfied with that and not press for a criminal case?

A I think that is an invidious way of putting it, Mr. Cutner. My principal concerns, entirely aside from my professional concern for the people that I was representing, I wanted to see the stockholders get the best possible break in this thing.

That was one of my concerns, too. I wouldn't call it a pound of flesh.

Q All right.

A Unless you are making a joke.

Q Well, I don't think it is any joke, Mr. Gould.

A No, neither do I. That is why I objected to it.

THE COURT: Let's get on with it.

4/2

Q Well, in this case, the TDA case, it is absolutely clear that nobody at the SEC made any promise that there would be no criminal reference?

A Is that a question?

Q Is that correct?

(Question read by the reporter.)

A If you mean that nobody used words which I can translate into a promise, you're correct.

If, on the other hand, you mean that they so spoke and so conducted themselves that I in my naivete based on a mere forty years' experience thought that I had a promise, then you are incorrect.

That is a matter of argument which you can make to his Honor, not to me.

Q Well, nobody said anything to you -- nobody said "Mr. Gould, you have a promise."

A No, sir, nobody ever said that to me.

Q It was your judgment.

A Either in this case or any other case, nobody ever said it to me. It was my judgment, yes, sir.

Q Were you quite confident that that was a deal that you had, Mr. Gould?

A Yes, sir.

Q You were not so confident that you were prepared to let your clients testify, is that right?

A Yes, sir.

Q You were not that confident, were you?

A That wasn't a question of my comparative confidence in the deal. I so arranged things that it was not necessary for them to testify, and as far as the SEC was concerned, if they had ever said to me, "We won't go forward unless you fellows testify," I would have told them to testify. They never asked me.

Q You asked your client to assert the Fifth Amendment?

A Yes, sir.

Q And you so advised the SEC in writing, is that correct?

A Early on in the case when I did not know whether it was going to go anywhere or not.

Q And that was in April, 1975?

A That is correct, until June of 1975, I did not know whether we were going to have a deal or we weren't, and until I knew that they were not going to testify. If they were asked after June I would probably have compounded my idiocy in this case by letting them go and testify.

Q I don't mean to be smart by this, Mr. Gould, but I want to ask you the question: You say that you exercised care and prudence and ethics in your professional dealings as a lawyer?

A I believe I do.

Q Now in your direct examination you testified that the understanding which you had with the SEC was arrived at on June 17 of 1975; is that right?

A No, sir.

Q Well, that was the first time that you understood the SEC would proceed in the manner that you proposed?

A That was the first time that I think I believed that they would, which is different from what I think you said just now.

Q Well, can you tell me, Mr. Gould, were you or were you not informed in June of 1975 that the SEC would not refer the case for criminal prosecution?

A Well, Mr. Cutner, from January until June we had been having conversations. Sometime in April they apparently had reached the point where they were asking for authority to put it on a more formal basis. I did not hear from them for a couple of months, and then in June they called me on, I suppose, my interpretation of what was said to me in June is "Okay, let's go, we have a deal. We have something going. Let's get to work on it. We are ready to draw papers."

Now I am naive. I assume that included all of the terms that we have been talking about and not just what they had in mind or not what they say they had in mind, but that may be naive on my part.

Q You certainly would not say that you are naive, would you, Mr. Gould?

A I would say it more after what happened in this case than I would have said it before about what happened in this case, yes.

Q You are saying that it did not occur to you to ask "Gee, fellows, are you going to refer the case or not?"

A Never occurred to me.

Q It never occurred to you to ask that question?

A I have never, in any one of the long line of cases that I have had -- never would say to them "Does that include what I have been talking about as well as what you are talking about?"

No, never.

When they call me and say "Okay, let's get the papers drawn," or something like that, I assume they are talking about what they wanted and what I wanted. That is what I assume.

Q Did it occur to you to ask them whether it would be their recommendation that there would be no criminal prosecution?

A Never occurred to me -- never occurred to me that I had to get reconfirmation of what I thought was clear to them, the sine qua non of the deal.

THE COURT: "Reconfirmation"?

THE WITNESS: "Reconfirmation."

THE COURT: When did you get "confirmation"?

THE WITNESS: In our conversations -- I believe that they were in agreement with that point of view, sir.

Nobody ever said to me, "You are flying your kite, Gould," -- it can happen as they did in some cases. I thought we all understood, if I was going to make these fellows strip themselves, reorganize the company, do all the things that we were talking about, they knew I could only do it if I held out the bait that they are not going to trial.

I said that fifty times. And when I talked to them in June it never occurred to me to say -- I don't remember what the words were -- there is no way I can reproduce the words but I can tell you that when I hung up the phone in June I thought I had an understanding with them, and part of the understanding was that there would be no criminal reference.

Now as I said to you, I think it might have been a piece of naive stupidity on my part.

A Well, if that is so, then I don't know what I have been doing here all afternoon.

THE COURT: What I understood, and we go back to the concept of the SEC not saying "yes" and not saying "no" -- I understood this witness's evidence to be that in respect of the New York office it is not the practice for them to say "yes" in so many words, "You have a deal" -- that it did happen several times in Los Angeles, and we have heard the evidence on that, of something comparable to that which also happened in Washington, and most recently we have been talking about that. But I must have understood the testimony so far about the practice in matters of this nature, in respect of the New York office, has been that such statements, such express statements, or close to express statements are simply not made by the SEC office in New York.

Have I followed this correctly, Mr. Gould?

THE WITNESS: I think that is substantially correct, your Honor. The only way I can fit this into the realities, I have a whole list of cases here where we discussed the possibility of criminal prosecution and they break down into more or less -- well, you are told right off the bat "Forget it, it can't be done."

In others we go on talking, and we try to put a package together that is acceptable to them.

On reflection the only thing I can say, nobody makes a deal -- it just doesn't happen. They don't write it -- there is no written contract.

I never saw a piece of paper in my life that reflects one of these understandings. That is why I was so incensed about the Brand, Grumet case and why I reacted with such vigor in it.

We have had a number of broker-dealer cases which I concede are a little different from this. I don't think that they are serious in their ramifications, unless they involve dealings, serious dealings with the public, and I can't even remember the names. Many times we said "We can do something if you can tell us you're not going to go criminal."

There isn't a lawyer in this field who hasn't had this experience.

THE COURT: Well, I am not sure that I have covered that, but if you want to put another question, Mr. Cutner, go ahead.

Q Would you say, Mr. Gould, that with respect to the cases that you settled in California, and indeed as well with respect to the cases you settled in Washington, you said, in substance, to the people at the SEC, "Please defendant?

A I never heard of it.

THE COURT: One of the named defendants in what proceeding?

MR. CUTNER: SEC v. Orafino.

THE COURT: Nothing to do with this case?

MR. CUTNER: No.

A I never heard of it. If you want to ask me the length that I have heard the SEC going in order to make a case against somebody, I will be glad to discuss it with you.

Q You never heard of the Orafino case?

A No.

MR. CUTNER: Nothing further.

REDIRECT EXAMINATION

BY MR. BENDER:

Q Mr. Gould, I know this is a difficult question, but in your practice could you give the Court just a general idea about how many SEC matters you have handled?

A I would have to be improvising. I probably have handled ten a year, maybe more, maybe 20 a year since 1946, when I became active in the field, starting with the first altered case, and I don't know, maybe it was five one year and 20 the next year. I dontt know. I don't remember them too well. I used to remember better than I do now.

Q You would say it was at least several hundred cases?

A Two, three hundred.

Q Of those cases you handled, about how many did you handle in the New York area?

A The vast bulk of them.

Q From your experience with the New York regional office of the SEC in these cases, can you state whether in those cases you followed the same procedure that you outlined that you followed in this case?

A Mr. Bender, where there was a case in which I thought that there was a possibility of criminal prosecution, I would have to say that as a general rule, what I tried to do was to prepare a technique, and I think I gave you before the concomitant elements, the constituent elements of this. This is something I have been doing for many years. It is not something you can teach in a law school.

Q Of the cases you mentioned, were there also cases in the New York area where you came up with an understanding where you would avoid criminal reference?

A I believe so. I am sure there are more than

MR. TIGHE: Nothing, your Honor.

BY THE COURT:

Q Mr. Gould, let me ask one or two questions and they arise out of Paragraph 3 of the consent judgment, which does read, as has been pointed out: "This consent is given by defendants Fields, Friedman and Davis voluntarily and no promise or threat of any kind whatsoever has been made by plaintiff Commission or any member, officer, agent or representative thereof to induce Fields, Friedman and Davis to enter into this consent."

Do I understand from your most recent testimony in which that language was referred to as boiler plate, that at the time of your discussions on this case with the SEC representatives, there was no discussion of this particular paragraph, is that correct?

A Well, your Honor, unfortunately you will find that the actual preparation of the documents was done when I was away, so I could not have done it, but I want to be very fair about it. If I had been here, I probably would have done the same thing, because it has been common practice, but I can't conscientiously say that I have ever discussed that paragraph with anybody.

Q Let me put my questions to you within the context of your general experience.

It seems to me that at the end of the kind of negotiations which you described in this case looking towards a consent judgment and a disposition of SEC civil litigation, at the end of such discussions, the SEC representatives can be in one of three possible minds. They could have decided, notwithstanding a consent judgment, to forward a criminal reference or, their state of mind could be, at the end of negotiations leading towards a consent judgment, they would not forward a criminal reference, and the third possibility would be that they simply hadn't made their mind up one way or the other at the end of these negotiations, and the consent judgment.

Now, my question with relation to SEC practice as you understand it is, whether those three possible states of mind have any bearing or influence upon whether or not this kind of Paragraph 3 appears in the consent judgment.

Do you understand my question?

A I understand your question very well, your Honor.

I would have to say that in relationships that we much more refined than this, that is, where more was said on the part of the SEC as to what they were going to do in terms of criminal prosecution, you will still find this language in the consent and I haven't looked, but I will bet anything that in the consent that was signed by every other defendant to the decree here, you will find the same language. It is picked up as a matter of course and that is what I meant when I said it was boiler plate. I don't mean it is contemptible, but it is there, always. Maybe we are loose in not excising it, but it is there.

Q And what your testimony is, that within the context of the three possible states of mind that I have just described to you, you would expect, just as a matter of boiler plate as you have said, to see such language in a consent judgment, whether the SEC had decided to make a criminal reference, whether it had decided not to make a criminal reference and whether it simply hadn't made up its mind?

A I would expect to see it is a part of any set of papers giving effect to one of these civil decrees.

MR. CUTNER: May I ask a few more questions?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. CUTNER:

Q Do you say, Mr. Gould, that paragraph that you refer to as boiler plate, do you say that is not subject to negotiation with the SEC?

A I suppose I wouldn't dare to say that, now especially. I have been educated. Everything is subject to negotiation with them. I have never negotiated on that point with them. I always assumed it was going to be there. I can analogize, but what is the point of it. I have not done it.

Q Is it fair to say then that it is boiler plate in the consents that you have negotiated?

A No. It is more than that, because you see, I have some little reputation in this field, very little of which I feel will survive your cross-examination, and I am frequently consulted by other lawyers, even some in this room have come to me with very specific problems in SEC matters, and they have shown me decrees and if I saw that in theirs, and I know I have seen it in theirs, I probably wouldn't pay much attention to it.

So, I can't say that it is limited to my experience. I would have to say it is limited to my experience and to several hundred lawyers who as a matter of course in the past, have retained me as supposed expert in this field, and I would say in our collective experience, this is boiler plate.

I hope I am right about that.

Q I don't understand that, you would concede that you do not know whether or not it is boiler plate?

A I don't understand that, I have no way of knowing what the SEC people have done with the others than myself and these several hundred lawyers in New York, Washington, California, Phoenix, Salt Lake City, Chicago, Cleveland, who have from time to time retained me as an apparent pseudo expert in this field.

Q I take it you would be surprised to learn that the SEC had negotiated that paragraph with other lawyers?

A I am delighted to hear they are advancing in that direction, yes.

Q In any event, you did not seek to negotiate it?

A I didn't. It never got to me.

REDIRECT EXAMINATION

BY MR. BENDER:

Q If you know the SEC did negotiate a paragraph like that, would that be most unusual in your experience?

A It would have been a surprise to me and I would have given it a try, Mr. Bender, as I give many things a try, but I just didn't know they would let that out in a case like this. It depends what kind of case you are talking about.

If they negotiated that out in a case with Goldman, Sachs or Dillon, Reed, or Merrill Lynch, I can obtained authorization from all three to make a disclosure to the Securities & Exchange Commission of all the facts and everything they had done so far as the SEC was concerned.

Q Did you attend any meetings of the SEC with Mr. Gould subsequent to the meeting you just described?

A The first meeting that I have any definite recollection of was in February -- on February 28, 1975 when we met with Mr. Tucker and Mr. Perlmutter, and also present was a Mr. Goldman, an investigator, and a Mr. Pernick.

At that meeting they discussed a possible injunction; they discussed civil sanctions; they discussed disgorgement, and I distinctly remember Mr. Gould saying "My primary objective here is to avoid any criminal reference. I would like to see only civil sanctions imposed on these defendants."

Q Was anything said by the SEC people who were present?

A Nothing, no specific response in connection with that statement.

Q Subsequent to that visit did you appear at the SEC, either yourself or with Mr. Gould at any other time?

A I may have seen the defendants in the office of Madison Avenue, but I have no recollection of having materially participated in any of the conferences or negotiations up until after September 22 when Mr. Gould became ill.

Q Tell us when after September 22, if at all, you appeared at the SEC in connection with your representation of Fields and Friedman?

A Well, after September 22 I was in charge of the case. I was not an SEC expert. I was asked to handle the matter because Mr. Gould was ill, and he felt that I could handle the three defendants, but I had a great many conferences and a great many conversations and many telephonic conversations with Mr. Tucker, Mr. Perlmutter, Mr. Herbert Kantor, and the three defendants.

It got to a point where Mr. Tucker and Mr. Perlmutter and I became very friendly -- we were almost on a first-name basis -- it was "Jeff" and "Judgey" and "Stuart".

And Stuart told me about the birth of his child and that he contemplated leaving the office, but all this dialogue was in connection with the negotiations for the final judgment and the civil sanctions to be imposed on the defendants.

Q In particular can you place any one particular conversation in October of 1975?

A Well, I searched my mind and I distinctly remember one particular meeting --

Q Who was present at that meeting?

A This was on or about September 30. My diary shows a number of meetings and conferences around that time, but I think it was September 30th when I had an appointment with Mr. Herbert Kantor, and I met Mr. Herbert Kantor on the 11th floor of the Federal Plaza Building across the street.

Q Who is Mr. Kantor?

A He was general counsel to TDA, or was at that time.

Q All right.

A (Cont'g) And Mr. Kantor and I went in to see Mr. William Moran, the Regional Director, on that occasion --

Q What was the purpose of that?

A I gave Mr. Moran a message. I had seen Mr. Gould at the hospital and gave him a message at the behest of Mr. Gould, that Mr. Gould was ill and that he was in the hospital; and from there -- from Mr. Moran's office we walked clear across the entire floor to the far end, to Mr. Tucker's office, and we had a conference in Mr. Tucker's office.

Q Who was present?

A Present there were Mr. Tucker, Mr. Perlmutter, Mr. Kantor, this Mr. Goldman, the investigator who sat on the desk, and Mr. Pernick. And Goldman was conducting the negotiations concerning the corporate reorganization, as to the number of directors, as to whether or not these boys should resign as directors, whet her they could vote their stock.

But my negotiations were limited to the amount of money to be obtained. Mr. Tucker said to me "Judge," he said, "We will have to get $50,000 in connection with the Westcalind finder's fee which they appropriated. Then we have to get another $435,000, or the amount of money, the profit that was received concerning the sale of the TDA stock, and in addition we must get $100,000 from them or from Mr. Sandberg concerning the Lehigh Coal finder's fee --

Q Is that Lehigh or Eagle?

A Lehigh. There was an acquisition, and as I understand it, Mr. Sandberg had received $100,000 finder's fee, which they said was an illegal transaction.

I said, "Jeff, it is a horrendous amount. There is a serious question about their liability concerning some of these figures, but in light of the fact that there is to be no criminal prosecution I shall endeavor to obtain the money for you."

A And I then went out and through persuasion and violence and cajoling we obtained all of the $585,000 that he had requested -- and that's the amount that was inserted in the final decree, and by this time I think they paid it.

Q Do you have any recollection -- you think that meeting took place September 30th?

A I think that was September 30th. I can't fix the date specifically. My diary shows that I had a meeting September 30th.

Q Well, did you receive a letter from the SEC enclosing copies of the final judgment and the consent?

A Yes, I did.

Q And would you say that this meeting or meetings that you described, in which you made reference to the statement that you just made, occurred prior to the time that you received the judgment?

A Oh, yes.

MR. BENDER: May I have this marked for identification, please.

(Document marked Defendants Fields and Friedman Exhibit A for identification.)

xxx

2 AM

Q I show you A for identification which is a copy of a letter sent you. Do you recall receiving the original of that letter?

A Yes, I do.

MR. BENDER: I will offer it in evidence, your Honor.

THE COURT: Show it to counsel, please.

MR. CUTNER: I have no objection.

THE COURT: Defendants' Exhibit A is received in evidence.

xxx

(Defendants' Exhibit A was received in evidence.)

Q As of October 31, 1975, would you say,Judge Streit, you had already conveyed to the SEC the oral consents of your client to go along with the terms, certainly the monetary terms?

A Yes, but I had some difficulty in getting the collateral at that time and we still had to obtain the collateral. They insisted on certain types of collateral. They refused security by Mr. Davis consisting of real estate and other things. They wanted bonds or surety company bonds. We were still negotiating concerning the collateral.

Friedmantold me he had pledged all of his stock.

Douglas said his collateral is up and Davis had great difficulty in getting the collateral which they insisted upon.

I have a record here of the proposed surety bond which they rejected and we had a conference on that. We were still negotiating at that time. The amount was set but the collateral was not.

Q Would you explain to the Court in what connection was the collateral requested?

A The money was not to be paid at once. They were given time. Davis was given a little more time than the others in which to put up the $560,000 but Davis didn't have the money and couldn't get the collateral. He was property poor and he gave me some document, Fidelity Deposit Company of Maryland bond which had some real estate in it, and I think Mr. Tucker rejected it because they couldn't foreclose on the real estate. They ultimately obtained the necessary security.

Q Was there any liability of each of these defendants mentioned in the final judgment and entry of consent?

A Yes. Friendman and Fields were jointly and severally liable for the $50,000 on Rushland, and they were jointly and severally liable on the $100,000 for Lehigh Coal except they were going to get a credit if Sandberg put up his stock and Fields, Friedman and Davis were jointly and severally liable for the $435,000. They originally put up some $74,000 which is all they had received in profit and we tried to persuade them it was a possible liability [illegible] the totalamount so they agreed to be liable for the [illegible]ire $435,000 and they each were paid another $120,000.

I think Davis got an extension of 30 months and the others were supposed to pay it out within 18 months.

Q In view of the difficulty in obtaining the collateral fromDavis, was the consent and final judgment held up until that was forthcoming?

A It was a question of persuasion. I had difficulty. They said they weren't liable, they didn't want to put up this money and I used a hammer and sledge to get the money.

Q What was the primary basis upon which you were able to succeed ingetting them to agree?

A Mr.Gould and I conveyed to them the thought that there would be no criminal prosecution and that was the only basis on which they would put up the money.

Q Did the SEC also require that your client Davis do something in connection with his right to practice before the Securities Exchange Commission?

A Yes. Davis was particularly vulnerable being a member of the bar and he was concerned they would bring some proceedings against him or forward the matter to the Bar Association. I think that Gould persuaded the SEC to limit the civil sanctions on him. I think it was called a 2E proceeding, but at any rate, he agreed never to practice before the SEC for the rest of his life.

MR. BENDER: May we mark this for identification.

xxx (Defendants Fields and Friedman Exhibit B was marked for identification.)

Q Judge Streit, I show you B for identification. Can you identify that?

A VEry frankly I think Mr.Gould handled this. I wasn't too familiar with it.

Q Were you familiar with what action your client --

A Yes. He signed a consent not to practice before the SEC.

Q Do you recallabout when that was?

A It was in December. Mr.Gould was well and active then and I think the negotiations were with Mr.Gould.

Q Do you know when in December that occurred? Was it the early part or later part?

A Pardon?

Q Do you know when it occurred?

A I remember it, the letter I sent to Mr.Tucker confirming my understanding.

MR. BENDER: I offer that.

THE COURT: You are offering only D?

MR. BENDER: Yes. While I did obtain that from the Government's file, the date is not too clear on when the document was executed and I would just as soon have Mr.Davis' attorney take up that document.

THE COURT: All right, D is offered. Is there objection?

MR. CUTNER: No objection.

xxx (Defendants' Fields and Friedman Exhibit D was received in evidence.)

Q Judge Streit, you signed this letter "Cordially" and before stating that you said "Thanking you and Mr. Permutter for all of your courtesies in which Mr.Gould joins me."

A I thought they were courteous at the time.

Q Would you have said that if you had known on December 1st that they had forwarded the case for criminal reference to the U.S.Attorney's office?

A It wasn't a very courteous act to do what they did. I didn't know about it or I wouldn't have said it.

Q Your greetings here in effect were because a job had been done and because in your mind, there would be no criminal reference?

A I had no intimation they had forwarded it to the Department of Justice.

Q As a matter of fact, your negotiations with respect to the documents that you received from the SEC and in connection with the collateral, continued right through into February of 1976, didn't it?

A No word was ever said to me or to Mr.Gould.

Q Did you subsequently find out that the SEC had made a criminal reference to the United States Attorney's office?

A Yes, when Fields and Friedman came up to the office with two grand jury subpoenas and I came down with them and saw Mr. Cutner.

Q What did you tell Mr.Cutner?

A I said, "Mr.Cutner, this is an outrageous thing. We had an agreement not to be prosecuted. We put up $585,000 and they are not going to go in the grand jury room" -- and Mr.Cutner walked away.

THE COURT: Is it the fact the negotiations on collateral and related matters extended through February of 1976?

THE WITNESS: Yes.

It was my view then if we were going to put up $580,000, there would be no criminal prosecution

(continued on next page.)

Q Would you say that that was the major inducement for entering into the consent decree?

A It was the only inducement. If these men, Davis, Fields and Friedman, had any intimation that there would ever be any criminal prosecution, you wouldn't get a quarter.

Q Well, it would be fair to say, then, that having it clear that there would be no criminal prosecution was at least as important to you as having it clear what the arrangements as to the collateral?

A Would you read that back.

(Question read by the reporter.)

A I'm sure I don't understand the question.

Q It was important to you to have it clear that there would be, as you put it, no criminal prosecution in the case?

A Was it important to me to have it clear? I had it clear. I understood there was to be no criminal prosecution.

Q And you also wanted it clear what the arrangements were concerning how much the defendants would pay and what the collateral arrangements were.

A Right.

Q And it was at least as important to have the arrangements concerning no criminal prosecution clear as it was to have the arrangements concerning the collateral clear, isn't that so?

A If you want to compare them. I never took the trouble to compare the importance of the two. One was collateral to the other, and they were related to the other, and it is part of the whole deal

Q Well, you did write to the SEC to confirm your understanding concerning the collateral?

A Yes, I did.

Q And you did not write to the SEC to confirm your understanding concerning the criminal prosecution?

A Mr. Cutner, I was on the bench for thirty-six years. There is a simple rule of law, you see, when there is a duty to speak and you don't speak, and a statement is made you are considered to have acquiesced in the statement that is made. You don't permit negotiations for ten months to go on and then surreptitiously and clandestinely go out the back door and go over to the Department of Justice while you are negotiating terms of settlement of a final decree.

Q Well, I really do not want to and do not mean to argue the proposition of law.

A Well, I don't know what you are referring to.

Q My question is simply, you did not write to the SEC to confirm --

A It wasn't necessary to write to them.

Q Can you point to any written record at all of this understanding that was reached with the SEC?

A I thought I made myself clear that I did not think it was essential to have any written record. If you tell a man "I am coming in here for the purpose of avoiding criminal prosecution," and you continue to negotiate with me, coram nobis applications in the State Courts immediately set aside any sentence or any conviction if the prosecutor makes a statement or a representation or is under a duty to speak.

Q One last thing, sir. You referred to a meeting with me outside the Grand Jury Room.

A Between you and me, yes.

Q And you said I walked away?

A Yes, you did.

Q You did not mean to suggest that I did not respond to you, did you?

A You did not respond. You did not say anything.

Q Are you saying we did not have a discussion at that time?

A You walked away and I took my clients and we went back -- we went home.

Q Well, did there come a time --

A There ultimately came a time, in the middle of 1974, when I received a telephone call, I think it was, from Douglas Fields, inquiring as to whether I would be interested in representing TDA, and asking if he could set up an appointment to talk to me about it.

I answered the first part affirmatively, and we set the date.

Q And did you subsequently become counsel, that is, your firm did?

A The firm subsequently became counsel to TDA, and most of those functions were carried out individually by me.

Q Could you give us just an approximate time when that representation was effective?

A I would say sometime in early September.

Q Of what year?

A 1974.

Q At or about that time did you learn of an investigation being conducted by the District Attorney's Office here in Manhattan with respect to TDA and Fields and Friedman?

A That occurred a little bit later. At the time that I was retained by TDA to be general counsel, I was not aware of the investigation. I was aware of it in October of 1974, so it was perhaps a matter of a month or a few weeks later that I became aware of it.

Q And what function, if any, did you have with respect to that investigation?

A When I learned that the New York District Attorney's Office was interested in investigating certain TDA transactions, I met with some of the officers of the corporation to discuss what it was about.

I found that some of the officers were personally represented by other counsel, and I asked to meet with the other counsel to be briefed on what the nature of the investigation was.

Q Who were the other counsel?

A It was Milton Gould. He represented the former general counsel for the firm, Peter Davis, and the company's president and financial vice president, Mr. Fields and Mr. Friedman.

I had discussions with them. I tried to learn as much ab out the investigation as possible, since I was now general counsel, and felt responsible for acquiring that knowledge as quickly as possible, and on several occasions the District Attorney's Office, being notified by me that I was counsel, got in touch with me and asked for records which I produced, and asked on several occasions for some witnesses to come down and talk to them, and I appeared with one or more of those witnesses at the District Attorney's office.

I also talked to several different assistant District Attorneys who had the case from time to time -- like Mollie Strum was handling the case at the time. I became familiar with that first, and when she left it was turned over to a man by the name of Peter Driscoll.

Q As a result of what you had discovered in your brief time as general counsel with respect to the DA's investigation, what if anything did you do with respect to that knowledge so far as the corporation was concerned?

A When I felt I was beginning to understand the nature of the investigation, at that stage I certainly did not have all the facts but I felt that I understood that there were serious accusations being made.

I immediately notified the members of the executive committee of the corporation, the two gentlemen who were -- that is, the president and financial vice president were members of the executive committee, but there were two other men who were also members of the executive committee.

Q What were their names?

A Mr. Lampert, Edgar, and Gerald Gelles. I felt that the entire executive committee should be made aware there was an investigation going on and since the executive committee functioned with the powers of the board of directors when the board itself was not in session, I immediately notified the other members of the committee, other than the ones that were being investigated.

I also had a representative of my office present at the annual meeting of shareholders which took place in October of 1974, and he discussed in person with the persons from the corporation who were present at the meeting the details of what was happening at the District Attorney's office and he was there for answering any other questions that might come up.

Q Did you thereafter communicate with the board of directors of the TDA?

A Yes.

Q When was the next scheduled meeting?

A I think I asked the executive committee to call a meeting of the board of directors as quickly as possible because although I informed the committee, I wanted the full board to be informed and in preparation with that, I also worked with the members of the executive committee, including Messrs. Fields, Friedman, Lampert and Gelles. What I wanted was some assurance that while I notified the board and took such action as I felt necessary, that the passage of time would not work adversely to the corporation.

So I asked former counsel and Messrs.Fields and Friedman to sign agreements which would enable us to maintain our confidence in their operation of the company and the agreements they signed were indemnification agreements under which they agree that whatever determinations were made in the future in connection with these transactions, that they would be financially responsible if there was any liability to the corporation and if no other persons made good for that liability.

Q What was the date of that meeting with the board of directors?

A The meeting was called on January 3, 1975, and I made my presentation to the board of what I had learned and what had transpired and I asked the board for authority to report my knowledge to the Securities and Exchange Commission.

Q Was the question of indemnification a matter that came up in that board meeting of January 3?

A I believe it was.

number of other members of the SEC staff who I was meeting for the first time and I am not really sure that I can account for everyone who was present, except there was at least a Mr. Nortman, Mr.Tucker, Mr. Perl[illegible]er and perhaps others.

Q To the best of your ability and recollection, can you give us what you heard and if you participated in any way, what you said and what anybody else said?

A We sat down in Mr. Moran's office and Mr.Gould and Mr. Moran exchanged -- a dialogue. It appeared to be locker room conversation. They appeared to have known each other for many, many years. The rest of us were sitting there while they exchanged this kind of banter.

Finally I think it was Mr. Moran who said, "Milton, what are you going to tell me today", and Milton Gould then proceeded to set forth that he represented a number of individuals, a group which he called"chevert."

Q Could you tell the Court -- are you able to translate what that word means and what is it, a German or Yiddish expression?

A It's probably both. Yiddish derives from German. A group of cronies, a group of friends.

Q He said he represented these people?

A Yes. He said he had become aware they were accused of engaging in certain activities which if true, would constitute violations of the securities laws, and he related generally what they were. He indicated to Mr. Moran, who he was really talking to, even though there were others in the room, that he had been in similar situations before and he recalled names of cases which Mr. Moran seemed to have acknoweldged in which they had participated and he suggested, or presented that the SEC conduct an investigation of the transactions that he was revealing to them and that when they were satisfied that they had the facts, as they had been presented and assuming there was no significant or substantial surprises, that we would jointly work on a complaint which would be filed by the SEC, a civil complaint, and hopefully at the same time, work out a consent judgment to that complaint which would require the defendants to take such action as he mutually felt was proper, as the SEC felt was necessary.

Changes in management, restitution of funds, injunctions against violations of the securities laws, and that if this could be accomplished to the satisfaction of the parties, that there would be no reference of the case for criminal prosecution.

Mr. Moran pointed out that he was the regional administrator and that he could not agree to such a proposal without first communicating to the Enforcement Division in Washington, but that he would do so and he would let us know if and when the Washington office had approved the suggested proposal.

He also said something to the effect we can't give immunity and I think Mr. Gould made it clear it was not immunity he was seeking, but that if the SEC was satisfied and the facts as disclosed were significantly as they were indicated to be, and if a satisfactory decree satisfactory to the SEC was filed, that there not be a reference by the SEC to the Justice Department.

Q As a practical matter, from your own experience, if the SEC didn't make a criminal reference, the likelihood of a United States Attorney picking up the case was extremely remote?

A That would be my experience.

The United States Attorney certainly had the right to initiate prosecutions but he normally did not do so. Most of his cases came in from the various Federal agencies.

THE COURT: How experienced were you in SEC matters, Mr. Kantor? I understand some of these people on the 11th floor you were meeting for the first time.

THE WITNESS: I was meeting some of the people in the SEC office for the first time, staff members, but I have had SEC matters over the years of private practice. I prosecuted SEC matters when I was in the United States Attorney's office. I was on trial for several months in an SEC case as a prosecutor, and I lived with the SEC staff, but mostly the Washington staff on that occasion for a year, in preparation and trial, and while this particular case, that is, TDA was being conducted, I had simultaneously another SEC matter that was being handled by one of the same men in theSEC office, Mr.Perlmutter.

So, I would certainly not be as experienced as Mr.Gould and I didn't have the years of experience he had, but I felt certainly in this particular area of criminal prosecutions of securities matters, that I was reasonably experienced for my age and practice.

THE COURT: Thank you.

Q Was there anything further discussed between Mr.Gould and Mr. Moran with respect to the situs of the investigation?

A Yes.

Q Would you explain to the Court?

A I was our proposal that the investigation be conducted by the regional office.

Q Regional office where?

A Here in New York, but there was indeed a distinct question as to whether or not the Division of Enforcement would authorize the New York regional office to conduct that investigation and that is something which Mr. Moran said hehad to seek authority for from the national office, the Washington office.

Q Did he say what he might do as far as recommending or not recommending?

A Yes. He said he would summarize our proposal and our conversations and forward it to Washington and recommend that an order be issued permitting them to conduct an investigation here in New York and that the New YOrk office be charged with the duty of carrying that out.

Q Was there any discussion as to why that would make a difference as to Mr.Gould's proposal, whether the matter was in New York or in Washington?

A I don't think it would make a difference ultimately in the proposal, but certainly we had come into the regional office.

TDA was here in New York. We were talking to the regional staff. We had made the proposal to the regional staff and it was a lot more convenient, in terms of geography for everybody, to do it here in New York.

If in fact theDivision of Enforcement had felt it should not be done in New York, I am sure Mr. Gould and I would have traveled to Washington and had a similar meeting in Washington where we would have made the same suggestions again.

Q Mr. Moran couldn't act on the proposal unless the investigation was in New York?

A That is right.

Q Was that discussed?

A I think it was understood Mr. Moran would be in charge of that investigation here in New York, sure.

Q Did Mr.Moran or anyone from the SEC at that meeting indicate that no such agreement could be made?

A No. As a matter of fact, Mr. Moran indicated that he would refer the matter to The Division of Enforcement and request that it be approved and that the New York office be allowed to proceed.

He said he was going to recommend it.

Q Was that the sum and substance of what occurred?

A At some point Mr. Moran indicated he wanted more details because Mr.Gould's presentation had been somewhat general and Gould then asked me if I would present the detailed information because I think I was more familiar with it than he at that point, and I did.

(continued on next page.)

Q What was his position at the time, do you know?

A Yes. He was chief attorney of the branch, at the Regional Office in New York.

I was in communication with Mr. Tucker. I believe it was he who told me that the approval had come in from Washington, and that he wanted to get moving on the investigation, and he asked me for various documents. He wanted me to prepare a schedule of all finders' fees that TDA had paid over a series of years, and he asked me -- and I told him that I had had a draft of an 8-K for the month of January 1975, and he wanted to see the draft of the 8-K -- that is the document in which written disclosure was made and -- oh, he wanted to see the agreements that I had drafted, as well as the contracts and such that related to the stock transaction back in 1971, and I arranged to get all the documents for him.

He made other requests from time to time -- I am not sure if I have included them all, but he was conducting an investigation and he wanted all relevant documents.

Q What transaction occurred in 1971, what did he have reference to?

A We were talking to the purchase by Minority

Resources Corporation of shares of TDA Industries from Blair & Company and ERD, and the subsequent resale of those shares off the market but to the public.

Q Was this a stock transaction which had been disclosed on January 14th?

A Yes.

Q And was that also one of the matters that the District Attorney had been investigating?

A Yes.

Q In addition to that material -- I withdraw that.

Did you supply that material?

A My office did. I think I supplied some of it. Some of my associates and partners supplied the balance.

I think we also gave some information to Mr. Nortman.

Q Did you consult with Mr. Tucker or anyone else at the SEC with respect to filing an 8-K for TDA?

A Yes.

Q Would you explain to the Court what an 8-K is?

A 8-K is a form filed by public corporations with the Securities & Exchange Commission. It is a form that is filed for a particular month -- if certain things occur within the month, and rather than waiting for a aware an investigation was going on and I thought I would be prepared to relate to the board what had happened.

I spoke with Jeffrey Tucker --

THE COURT: Did you initiate that call?

THE WITNESS: I think I iniated the call to him.

Q At that time what had your relations been with Mr.Tucker?

A I had a great deal of respect for Mr.Tucker. I met him in connection with this case. He seemed to be very plain-spoken. It was very easy to work with him. When I asked a question he gave an answer. When he asked questions, they were easy to answer. I was beginning to develop a good working relationship with him.

Q Tell us what happened. You called him on the phone?

A One day I met him running in the streets. He was apparently a jogger and it had nothing whatsoever to do with this case, but it just added to my knowledge of him and I also learned that he was an excellent basketball player.

It was a relationship that was developing.

Q So you called him?

A I called him. It was June 17th my notes reflect, and I asked him how is he doing, the investigations were going on, he knew I had appeared with many of the witnesses, any surprises, is it going all right, where are you, when can we expect you will be through, and Tucker said to me it was going okay, there were no surprises and I believe he said he was 95 per cent complete.. Those are his specific words, 95 per cent complete. I remember him saying that. I said to him that I was pleased to hear that and that I would be relating to the board of directo s that his investigation had not come up with anything unusual and that he was just about completed.

THE COURT: By "surprises" I suppose you mean transactions or matters or subjects for concern which had not been initiated previously?

THE WITNESS: Exactly. One of our conditions was that the facts as we presented them and as we understood them to be on that day, should not be substantially different and that the investigation should not disclose anything different than we had disclosed. Obviously if it did, we had a much different situation on our hands.

I was very much concerned I was not aware of all the facts. I had done a certain amount of investigation but certainly the SEC would do a lot more than I did, but it was certainly beyond my control and my knowledge and I was very anxious to learn whether their investigation tended generally to confirm what I had disclosed.

He told me that his investigation was 95 per cent complete and that it had roughly confirmed what had initially been disclosed and that everything was okay.

I asked him about the other five per cent and he said odds and ends, and I felt I could report to my board.

Q In words or substance, did he say anything in respect to Mr. Gould's primary objective disclosed on January 14 that there be no criminal reference?

A I don't think we specifically discussed that. We had been in touch with each other, not on a daily basis but on a very, very frequent basis for now close to six months and each day we talked, we didn't use the whole preamble reciting what had gone before.

It was a relationship that was moving along on a day-to-day basis or week-to-week basis and we would discuss what was on our minds on that particular occasion and I don't recall discussing anything more than what I have said.

Q Did you as the result of that conversation with Mr.Tucker have any reason to believe that what he had said was an acceptance of Mr.Gould's proposal, that there be no criminal reference?

A When you say Mr.Gould's proposal, I guess I was a part of that as well, and I understood him to say that a part of the proposal was that they conduct an investigation and see whether the facts were as we set them forth and he was telling me although his investigation was not 100 per cent complete, that for all practical purposes, it was 95 per cent such and I don't think he would have related that to me if there were any other substantial things he had to do in the investigation, so I had understood from what he was telling me that the SEC had determined the facts were as they were supposed to be as one of the conditions that had to be resolved for our proposal.

Q Did you thereafter have a board meeting on July 8th?

A Yes.

Q Do you have the minutes of that meeting?

A Yes.

Q Did you have anything to do with the preparation of those minutes?

A Yes.

Q Were you present during the entire meeting?

A I believe so.

Q Did you make a report to the board as to the status of the SEC investigation?

A I did.

Q Was Mr. Fields and Mr.Friedman there?

A They were.

MR. BENDER: Would you mark this?

xxx (Defendants' Fields and Friedman Exhibit H was marked for identification.)

Q Mr. Kantor, you have gone over these minutes.

A I have reviewed the minutes, yes.

Q They accurately reflect what took place on July 8th before the board?

A Yes,they do.

MR. BENDER: I offer it in evidence.

MR. CUTNER: I will be very happy to have it in evidence. No objection.

THE COURT: It is received, rhetoric or no.

xxx (Defendants Fields and Friedman Exhibit H was received in evidence.)

Q Mr. Kantor, did you tell the board, which appears on page 23, the following: "Mr. Kantor presented a comprehensive review of the investigation undertaken by the New York County District Attorney's office and the staff of theSEC relating to certain events which occurred during 1971 with respect to the payment of a finders fee by

Westcalind Corporation to Bernardi Resources Corporation in connection with the acquisition of Trophies, Inc., and affiliated companies (the finders fee transaction) and with respect to transactions involving the sale of common shares of the corporation by several large shareholders to Bernardi Resources Corporation and the subsequent resale of such shares to the public of stock transactions."

I will not read this, but you then explained to them the status of theDA's investigation in Manhattan and going on to page 25, you indicate who you interviewed in connection with the finders fee transaction and who you attempted to communicate with, and then you say with respect to theSEC investigation, "Mr. Kantor reported that on June 17, 1975, a member of the SEC staff had informed him that their investigation was 95 per cent complete and that his staff would not refer the matter for criminal prosecution. Instead, it was intended that the staff at the New York regional office would recommend to the national office of the SEC that a civil complaint be issued relating to these matters and that Mr. Kantor, on behalf of the corporation,and other counsel on behalf of the individual parties would be given the opportunity to discuss the content of a civil complaint with the staff of the SEC prior to the issuance of any complaint.

"It is presently expected that the proposed civil complaint will name as individual defendants Douglas P.Fields, Frederick M.Friedman and Peter S.Davis. To date the staff has indicated that it has not made a final determination with respect to the possible inclusion within the complaint of Messrs.AlanSandberg, Eric Berje, Westcalind Corp. or the corporation."

Is that what you told the board?

A Yes.

Q Was that a true statement?

A Yes,sir.

y Your statement to the board that on June 17 you had spoken to a member of theSEC staff, to which member had you reference to?

A I was referring to my telephone conversation with Jeffrey Tucker.

Q Is it your testimony that on June 17, as the result of the conversation you had with Mr.Tucker and the sum and substance of the words were as you reported to the board, that their investigation was 95 per cent complete and his staff would not refer the matter for criminal prosecution?

A That is correct, Mr.Bender, but although I was referring to a telephone conversation with Jeffrey Tucker for a portion of what I related at the board meeting, there were other conversations that I had with other members of the SEC that I was also relying upon for certain other things I was saying.

For instance, insofar as who would be included in the complaint. That was a telephone call that I had that was initiated by Stewart Perlmutter to me where he called me to say that they had not yet made up their mind with regard to certain of the defendants, but that Messrs. Fields, Friedman and Davis would be included in a civil complaint.

There were other conversations that I think I had with the staff that I was relying upon, although that 95 per cent complete quote comes from my conversation with Jeffrey Tucker.

Q And the statement you made to the board that they told you that there would be no referral of the case, that was in substance what he had said to you?

A Yes.

Q And nothing more than a confirmation of the proposal that Mr.Gould and you present made to Moran and Mr.Tucker and the others who were there on January 14?

A That is correct. I think you will find that in the January 23 minutes when I related that conversation to the board, I indicated that it was my belief that there would be no reference for criminal prosecution, but I was unwilling to go beyond belief, because I knew there were contingencies and whether or not a consent decree would be signed and when I reported what happened at that original January 14th meeting to the board on January 23, I said it was simply my belief and the basis for the believe was that I thought these contingencies would come to pass.

After the investigation was complete or 95 per cent so, as Mr.Tucker told me, and as the result of my conversation with him, I felt that the most uncontrollable contingency had been resolved and I knew at that point, no matter how hard the SEC made the consent decree, that if we wanted to sign it, we would have our propose completed.

So the part that was out of my control was now completed.

THE COURT: Let me see Exhibit H a moment, Mr. Kantor.

In the light of your last answer, I want to make exactly sure what your testimony is. On page 27 of Exhibit H, this sentence appears:

"Mr. Kantor reported that on June 1-, 1975, a member of the [illegible] had informed him that their investigation was 95 per cent complete and that his staff would not refer the matter for criminal prosecution."

Is it your testimony a representative of the SEC said to you in so many words that the SEC staff would not refer the matter for criminal prosecution?

THE WITNESS: In substance what Mr.Tucker said to me, led me to that belief.

As to the specific words that he used, I can no longer relate them. The 95 per cent complete, I recall specifically. Those were his words. I do not believe on that particular occasion, your Honor, Mr.Tucker said to me,"and by the way Herb, there will be no criminal reference in this case".

THE COURT: Not on that particular occasion, but did Mr. Tucker ever use those words to you?

THE WITNESS: We discussed criminal prosecution, people going to jail on a number of occasions, the most recent of which was the last meeting before the SEC when Mr. Ostrow was making a plea on behalf of Mr. Sandberg, hoping that Mr.Sandberg would not have to sign a consent decree at all, and after making that plea and Mr.Tucker said he was not persuaded, Mr. Ostrow said, I don't want my client going across to the gold-domed building,"and I think we all understood it mean criminal prosecution.

On many occasions when the SEC was pressing for severe relief in the consent judgment, we would argue surprises, no untoward things. It was 95 per cent completed. It looked okay. I think that was his statement or words to that effect, and he indicated he would be getting onto the next stage which we had proposed, and they had agreed, which was the preparation of a civil complaint and seeking the approval from the Division of Enforcement as to what would be contained in that complaint and what the provisions would be.

Of course I had also had a conversation with stewart Perlmutter in or about that same time that I also relied upon when talking to the board. By this time I believe Mr. Perlmutter had become the branch chief and Mr.Tucker had been moved up to an assistant administrator and it was Mr. Perlmutter who had indicated to me that not only had a decision not been made as to who the defendants would be in the civil complaint, but he also told me that the corporation would not have an allegation of fraud made against it in the complaint.

Q His Honor asked you whether anyone at the SEC had ever indicated to you that they hadn't or wouldn't make a criminal reference.

Do you recall his Honor asking you that?

A Yes.

Q Did you have a conversation with Mr.Tucker on or about May 5, 1976?

A Yes.

Q Would you tell his Honor --

A It was early in May.

Q Would you tell his Honor what happened?

A Yes.

MR. BENDER: I am jumping out of order on this just so we can get back on your question.

THE COURT: It is all right.

A This was after the consent judgments had been filed. The consent judgments had been filed in February of 1976. This was early May and I had learned that the United States Attorney's office had been calling witnesses to appear to give testimony or to talk to an Assistant United States Attorney in connection with the TDA matter. Matters similar to what we had gone through in theSEC and District Attorney's office. I was surprised to hear that, since I felt we had made a final resolution of the case at the SEC and there was not going to be any reference.

Q Any criminal reference?

A So when I went in to see the Assistant U.S. Attorney, Mr.Cutner, we talked about a couple of hours and we talked freely about the case, I told him who I was and that I represented the corporations and asked him what he doing, in effect, and he told me in very general outline that he was investigating all of the facts relating to the TDA matter and after that meeting, I was somewhat confused and as I said, very surprised, so I called Jeffrey Tucker at the SEC, because I had an understanding with him and I felt the fact that the United States Attorney's office had the case, it was at least indicative of the fact that that understanding had been violated.

I called Jeff and said to him I had been over to the U.S. Attorney's office and much to my surprise found an Assistant U.S.Attorney had had the case and was investigating and I wanted to know, and I asked him specifically, did the SEC refer this case for criminal prosecution to the U.S. Attorney's office. I wanted to know had he broken what I considered to be our understanding, and I had great respect for him,I didn't think he would do something like that, and he said to me no, the SEC had not referred the case and I said I am so happy to hear that because it reaffirmed my judgment of him. The SEC hadn't done it and I don't know how the U. S. Attorney's office had got the case, but I knew at least in talking to Mr.Tucker, that it was not the SEC that had broken the understanding.

I think I told Mr.Tucker, I am sure I told him how happy I was. I said I am delighted to hear it was not the SEC that referred it.

nd 6 AM

September 16th Mr. Perlmutter called me that morning and said that he couldn't wait any longer, that he was going to file this complaint.

I reminded him of another understanding that we had, that the complaint would not be filed until Mr. Gould and myself had a chance to review it, and he said that he had given us a long enough time to sit down with him and that he was going to file the complaint that day.

And I said "When?"

And he said "At twelve noon" -- and that was like an hour from the time we were talking.

And I said to him "Don't. At least give Mr. Gould and myself a chance to talk to you."

And he said -- that he's got to file it and he's going to file it, and he wanted to call me to tell me he was going to file it, and that he was going to call Mr. Gould and alert him that he was filing it, and he filed it.

Q Did you get a copy of that complaint?

A I think I sent down that day to get a copy of it. I don't recall whether I got a copy that day or that afternoon -- I think Mr. Perlmutter sent a copy to me.

Q Were the allegations of fact in the complaint the same in substance as to the transactions, as disclosed by Mr. Gould and you to the SEC?

A Yes, they were included in the complaint, and true to his word TDA and Westcalind were not charged with fraud -- the 10-B kind of allegations. The individuals were, and in the interim, Mr. Perlmutter had told me that in addition to Fields, Friedman and Davis, that Messrs. Sandberg and Berje would also be named as defendants, and they were.

Q But the transactions in the complaint were none other than what had been disclosed previously, is that correct?

A Well, the stock transaction was laid out in great detail, the finders' fees were laid out in great detail --

Q That is all that you had disclosed?

A Yes.

Q So there were no surprises in the complaint so far as the facts were concerned?

A The complaint set forth more or less what we expected it would.

Q All right. Then what happened? Did you negotiate further with them?

A We were somewhat disappointed that he filed the complaint on the 16th, because we had hoped that we

THE COURT: All right, thank you.

Q At the time of the indemnification agreement, do you know whether Mr. Schoenbrun was alive?

A I think Mr. Schoenbrun died in June of 1975 -- at least I was so informed by a member of the SEC staff.

I had been looking for Schoenbrun. I wanted to talk to him and I wasn't able to find him.

Q Did you contact anybody at the SEC to assist you?

A Yes.

Q Who was that?

A I asked Mr. Perlmutter.

Q What did he tell you?

A Mr. Perlmutter told me that he was not at liberty to tell me where Mr. Schoenbrun was but he did intimate that Mr. Schoenbrun was ill.

So I then proceeded to see if I could find him in any of the hospitals in New York, and when he wasn't registered there I checked with hospitals in the Miami area, figuring he might have gone south.

I did not locate him.

Q I think I asked you this but I'm going to ask you again: Did Mr. Tucker tell you that on December 1st he had forwarded the case to the U. S. Attorney's Office?

A No, he did not.

Q Did you have conversations with him after December 1st, and correspondence with him?

A Oh, many.

Q Did he at any time tell you that he had forwarded the case?

A No. Not only did I continue to speak to him in connection with the negotiating of the consent decree, but there were many things in the consent decree which required us to stay in communication right up to this very time -- the appointment of the five additional directors took a considerable time.

We had a number of meetings through 1976 and right into 1977.

I think some of those directors were appointed as recently as a few months ago.

Q Did you suggest some directors that they did not want and they suggested some directors that you did not want, or what?

A Yes. Mr. Tucker and I sat down together. We decided we wanted independent directors, and I presented to him for the first time a list of proposed candidates -- I think it was in December of 1975, and I asked him if he would give me a list of people that he might like me to consider, and to have the board look over.

He ultimately gave me a list of three people whom I interviewed, and I think I made my first motion to this Court requesting the appointment of independent directors in the spring of 1976.

Mr. Tucker represented the SEC in that part of it, and I represented TDA.

We had much communication, telephone conversations, meetings, and the ultimate selection of those directors took a considerable period of time, all during which we were in communication with each other.

Q Now in connection with proposals suggested by the SEC to you with respect to how much Fields and Friedman should put up -- I will withdraw that.

Did the SEC make any direct proposals to you that they had made to Judsge Streit with respect to Fields and Friedman?

A I think I was present at a meeting at which the SEC staff suggested that there be included in the consent judgment a payment to TDA, of all of the amounts involved in the complaint and Mr. Streit, representing the individuals, said okay, that he would recommend to his clients that even though it was most severe, that they do it, and that we get a consent decree that would comply with our proposal.

Q Did he say anything as to why he would induce them to do it?

A He didn't want them to go to jail. He didn't want a criminal prosecution.

Q Is that what he told the SEC at that meeting?

A I am not sure if he used the same words that I just did, but in substance, yes.

(Continued on next page.)

Q Was there any conversation with them with respect to their ability, financially, to agree to the terms?

A Surely.

Q What happened in those conversations?

A Mr.Davis had indicated that he had some properties but they were mostly real estate and he was not liquid and didn't have the funds that would be required for him to make that commitment.

Mr.Friedman had indicated that he had no substantial net worth; that he had an income which he felt was substantial but he had no accumulation of wealth and it would be very difficult for him to come up with such moneys and someone -- I don't recall who it was -- suggested that he go to family.

Mr.Fields I think was the only one of the three that had some accumulated wealth and he had indicated why should he make payment of funds that he never received and he was told because we were settling a case and we were resolving it and in the long run, it probably would be far wise for him to comply than to continue to fight it.

Q Did any third parties connected with TDA, the TDA board in any way got involved in this question of whether Fields and Friedman should agree to the terms?

A Yes, I think they did.

filed?

A It was of paramount importance.

In representing the corporation, I wanted the matters to stop with the SEC complaint and the subsequent judgment and the only way to accomplish that and to avoid it being referred to any other agency, was to agree to file a subsequent judgment and that was one of my principal motivations, my overwhelming motivation.

Q Would you say that was the primary reason why Fields and Friedman signed the consent?

A I would believe so, yes.

Q That was because of the understanding that was conveyed by you to Fields and Friedman that by so doing, there was an understanding they would avoid criminal reference, is that right?

A Correct.

Q Were you present at any time when Mr. Gould so advised Mr. Fields and Friedman?

A Yes, I was.

MR. BENDER: No further questions.

XXX CROSS EXAMINATION

BY MR. WRIGHT:

Q You have just testified to conversations you have had with defendants Fields, Friedman and Davis with

I suggested to Mr. Sandberg that he should get separate counsel and I believe he did.

Q Who is that, please?

A Norman Ostrow. Mr. Ostrow was then with Rogers & Wells, and he ultimately left that firm and formed another firm.

I think mostly what I did with Mr. Sandberg, he was anxious about what was happening and I would keep him generally informed as to what the progress of our discussions with the SEC were with regard to TDA and what some of the other individuals were doing and what the progress was with their cases.

Q During these conversations, did the concept of a criminal reference from the SEC to the United States Attorney come up?

A Yes. I had told him that Mr. Gould and I had made a proposal in January that we were carrying out its provisions, it was being worked out, the investigation was going on, the complaint was being worked on, and that I hoped that the end result would be that there would be no criminal reference on the case and I told him it depended upon whether or not there were different facts and whether or not we would sign satisfactory consent decrees.

Q Did you have any conversation with him at or about the time he signed the consent decree?

A Yes.

Q Would you relate those conversations, please?

A He came to me one day and said he was unsure whether to sign a consent decree personally and wanted to know whether I would talk to him about it. I told him I couldn't advise him legally because I wasn't his lawyer and he had his own counsel and he said he understood it but he wanted to know what everybody else was doing and I said for what it was worth, I could tell him what others intended doing, but he should make up his own mind.

I told him as counsel for the TDA and Westcalind, there was no doubt in my mind the corporations would sign a consent decree. I said that Messrs. Fields, Friedman and Davis would do so as well. I wasn't sure what Mr. Berje was going to do, although Mr. Berje who had separate counsel was certainly contemplating signing the decree and that the reasons why they were going to sign the decree was very simple, they wanted to avoid prosecution.

Q Did you during this period have any conversations with Mr. Sandberg's counsel, Mr. Ostrow?

A Yes, I did.

Q Would you describe those conversations, please?

A Norman Ostrow and I spoke on the phone on a number of occasions. I am sure we met in person on a few occasions as well, and Norman also wanted to know what was happening at meetings which he did not attend and Mr. Ostrow felt that of all the defendants, perhaps Mr. Sandberg had the least participation in anything and perhaps he should not sign a consent decree because in an independent case, he felt his client had not done anything wrong and it would be established that he had done nothing wrong. I said to Mr. Ostrow that he was Sandberg's lawyer and he had to take into consideration whatever facts he thought pertinent and make his decision.

I think Mr. Ostrow was trying to urge me, since I was in more frequent contact with the SEC staff, to establish some kind of distinguishing factor between Mr. Sandberg who was his client and others in my conversations with the SEC. I think that is what he was doing. I am not really sure.

Q Is it fair to say in your conversations both with Mr. Ostrow and Mr. Sandberg, that you conveyed to him your professional opinion that if Mr. Sandberg consented to the decree, that no criminal reference would be made?

A Yes, and the reverse was true also. There was no question in my mind if Mr. Sandberg did not consent to the decree, that there would be a criminal reference.

MR. WRIGHT: Nothing further.

THE COURT: Mr. Kantor, on what did you base that last conclusion if there had not been a consent decree executed there would be a criminal reference?

THE WITNESS: I based it on the many, many conversations and meetings that we had been having. The fact that we had originally made the presentation and made the commitment to cooperate and to furnish all the information and to sign a subsequent decree for the purpose of avoiding a criminal reference.

On many occasions when there were hesitations or delays, there were various colloquial references to the significance of going to jail, which persuaded us very quickly that arguing over minutia was not the thing to do in this case and some things which may even appear to be significant might be minutia by comparison.

There was a final meeting at the SEC which I think I described in my testimony earlier which Mr. Ostrow was personally present at and there Mr. Ostrow made his last summation to the SEC staff. Mr. Tucker in particular, although all four members were there, Tucker, Perlmutter, Pernik and Goldman and Mr. Ostrow made the reference to the Gold dome across the street, meaning criminal prosecution and he was not contradicted by anybody, private counsel or SEC staff and finally decided that his client would sign the consent decree at that meeting.

CROSS EXAMINATION

BY MS. SWEENEY:

Q Mr. Kantor, do you know Eric Berje?

A Yes.

Q When did you first meet him?

A Either late 1974 or early 1975.

Q Did you represent him when he testified before the SEC in connection with this matter?

A Yes.

Q Did you continue representing him thereafter?

A For a short period thereafter.

Q Then he obtained separate counsel?

A Yes. Mr. Berje was an employee of Westcalind. The SEC asked me if I would produce him. I did, I appeared with him. After he testified, I recommended that he obtain his own personal counsel. I don't recall whether he did. I continued to represent Mr. Berje in a very limited capacity. I had an understanding with Mr. Perlmutter since Mr. Berje lived in California and had a great deal of difficulty getting to New York, that service of documents could be made upon me here in New York on behalf of Mr. Berje and

I would refer them out to Mr. Berje in California.

When stipulations were signed to adjourn matters with regard to the complaint, I agreed that for the limited purpose of accepting a stipulation, I would sign his name, but I did not represent him in chief from a time shortly after he testified.

Q This new counsel he obtained, did he attend the SEC meetings with you or with Mr. Goud?

A No.

Q In late 1975 or early 1976, did you have conversations with Mr. Berje concerning your discussions or Mr. Gould's discussions with the SEC?

A Can you repeat the question?

Q In late 1975, early 1976, that is, before the consents were signed, did you have conversations with Mr. Berje concerning discussions that you had had or Mr. Gould had had with the SEC?

A Yes.

Q Could you tell us the substance of those conversations?

THE WITNESS: May I take a liberty, your Honor? As a lawyer, when someone can't be heard, I usually ask them to speak up.

Q I am sorry.

THE COURT: Keep your voice up.

Q Can you tell us the substance of those conversations?

A I talked to Mr. Berje periodically. I talked to his Los Angeles counsel occasionally and I think he also had a lawyer in New York who was cooperating with the Los Angeles counsel, and I informed him of what was happening at our meetings with the SEC, what progress was being made, what disputes we had, what the difficulties were and when we ironed something out, what it was.

I also told him of the proposal we had made in January and Mr. Berje would call me periodically and want to know how things were going and I would tell him.

Q Did he express to you a great reluctance to sign the complaint?

A I smile or hesitate only because you are saying "a great reluctance."

Q I will withdraw that.

A If you allow me to put it in my words, Mr. Berje would have preferred not to sign a consent judgment. I think most people would prefer not to. It's a serious document and affects a man's legal rights and he had expressed to me on several occasions what is the necessity and I had told him of another understanding I had reached with Mr. Perlmutter and that was, the principal discussions that we were having involved TDA and [illegible] transactions. We kind of consigned Westcalind to the side and Mr. Berje was an officer of Westcalind and it was my understanding with Mr. Perlmutter, that when we completed the consent judgment on TDA, that before I would have to commit Westcalind and before Mr. Berje would have to do anything with regard to his consent judgment, that Mr. Perlmutter would give me an opportunity to review the SEC evidence with regard to Westcalind because I was of the mind that Westcalind might not have been in the same position as TDA and might not be the same kind of a case and Westcalind was certainly far less important and I informed Mr. Berje of my understanding with Mr. Perlmutter, so his decision was kind of put off until Mr. Perlmutter gave me the opportunity he had promised to review the evidence with regard to Westcalind.

I should complete that by saying that Mr. Perlmutter fulfilled his word, he did call me down after the TDA consent judgment was signed. I did go over the evidence which he offered to me. I was persuaded that we ought to sign a Westcalind decree as well and I conveyed that to Mr. Berje.

Q In your opinion, would you say from your discussions with him that he would not have signed the consent if he had not heard of your conversations with the SEC and your proposal, that he would not feel --

A I can't hear you.

Q In your opinion, do you feel that Mr. Berje would sign the consent basically because you had told him of your proposal to the SEC, that there would be no criminal reference?

MR. CUTNER: I will object to this.

I know the court previously ruled it would take testimony on a witness' opinion as to other people's opinion but we have been getting so far afield here, I don't think it's proper testimony.

THE COURT: I will sustain the objection in this particular instance. It seemd to me when we were talking about opinions being expressed and inferences being drawn by counsel who were representing the individual defendants directly, that was proper, but I think in this particular case in view of the fact Mr. Kantor did not represent Mr. Berje directly, I think it becomes too speculative. I will sustain the objection.

MS. SWEENEY: May I have this marked as an exhibit, please.

XXX (Defendant Berje Exhibit J marked for identification.)

MS. SWEENEY: Your Honor, this is a copy of the final decree and consent that Mr. Berje entered into and signed in February, 1976. Mr. Cutner has consented.

MR. CUTNER: No objection.

THE COURT: It's received.

xx (Defendant Berje Exhibit J received in evidence.)

Q Just before Mr. Berje signed his consent decree, at that time were there any discussions between you and Mr. Berje about the SEC referring the case criminally to the Department of Justice?

A Yes.

Q Can you tell us what was said?

A We had so many conversations that it's sometimes hard to isolate the particular one when they flow into each other, but I told Mr. Berje that everyone was signing a consent decree and that we had made a final disposition of the case or would make one if he did the same. I told him that he and Sandberg were the last two to make up their minds. I guess I just generally summarized.

Mr. Berje at that time was represented by a man named Hochstein or Hochberger, a California lawyer.

Q Do you know what Mr. Berje said to you when you were discussing this with him?

A Do I remember what?

Q Do you remember what Mr. Berje said to you when you were discussing the possibility of the SEC referring this case to the Department of Justice?

A Yes. He told me his health was ailing, that he had neither the funds nor the physical stamina to go through further litigation and if that is what it took to dispose of the case and not have criminal prosecution, he would sign his decree.

I told him that I couldn't tell him what reasons he should use to make up his mind, that he should discuss it with his lawyer and do whatever he and his lawyer though proper.

MS. SWEENEY: That is all.

MR. NAFTALIS: Your Honor, I came in the middle of Mr. Kantor. Might I have over lunch to find out whether I want to ask him a few questions?

THE COURT: Why don't you consult with your colleague during lunch. He stood in well for you during your absence and we will convene again at 2:00 promptly.

(Luncheon recess.)

concerned about the individuals as well?

A Absolutely.

Q You went to the January 14th meeting at Mr. Moran's office with Mr.Gould?

A I was there.

Q And you say that Mr. Gould made a proposal to the SEC, is that right?

A Yes.

Q And the proposal in essence was, you guys investigate the facts that I have disclosed to you this morning. If there are no surprises, if your investigation reveals that the facts are pretty much as I have described them to you, we will get together about a complaint and we will settle the matter at the same time, is that fair to say?

A That is only a part of it.

Q The other part of it was, if we do all of that, we will avoid a criminal reference in the matter?

A That is correct.

Q That is the proposal Mr.Gould made to Mr.Moran and others at the SEC?

A Mr.Gould had talked for a while. He had indicated dispositions of a similar nature he had worked out with that office in similar cases and he said, Here are the facts, investigate them. If you find out what we have disclosed voluntarily to you is substantially what your investigation reflects and if we could put together a complain and consent decree and that will satisfy you, let's do so and as a part of that, there will be no reference for criminal prosecution.

Q And you say that Mr. Moran agreed to make a recommendation to the Washington office, the national office that it accept the proposal that Mr. Gould made?

A That is correct. He pointed out that he on his own had no authority to do so and he had to request authority from Washington.

THE COURT: Hold on. At that January 14th meeting, did Mr. Moran say he would have to get authority from Washington to enter into such a proposal or was it simply limited to getting authority from the Washington office to conduct the inquiry to see if there were any surpises?

THE WITNESS: Both, your Honor. The proposal had been made. He needed authority to accept it and he needed the authority to investigate the case in New York, because it could have been that Washington would not have given him the authority to conduct the investigation, in which case we would have all gone off to Washington.

THE COURT: Surely, Mr. Kantor, he was hearing about this case for the first time?

THE WITNESS: That is correct.

THE COURT: He couldn't be in any position to make any sort of evaluation to recommend acceptance or rejection about it until after he conducted an inquiry?

THE WITNESS: That is why it was contingent on what his inquiry would show. He could not make any commitments until he verified what the facts were.

Q Didn't you testify this morning that Mr.Moran agreed to recommend Mr. Gould's proposal?

A Yes, and the proposal was that an investigation be conducted and if that investigation showed the facts to be substantially as we had related them, and if a consent decree, consent judgment could be worked out satisfactorily to the SEC, if but only then would there then be a resolution of the case. There were contingencies that had to be worked out.

Q In other words, Mr. Kantor, Mr. Moran made an evaluation and determination right on the spot that if the facts were as Mr.Gould disclosed to them, there would be no criminal reference or that would be his recommendation?

A That was substantially what the proposal was and what Mr. Moran said he would do if in fact the investigation showed that that was the case.

Q He made the determination right there, right?

A Yes.

Q You had testified this morning to the TDA board of directors meeting that occurred on July 8, 1975.

A That is correct.

Q And you reported to the board that a staff member had informed you that the SEC would not refer the case for criminal prosecution?

A Yes.

Q Would you concede, Mr. Kantor, that that statement was an exaggeration?

A In no way. That statement was based on a conversation that I had with Jeffrey Tucker. There was no question in my mind I was accurately reporting to the board. I reported to the board the original deal as it occurred with no knowledge whatever this would happen. That was back in January. I reported to the board in July. It was contemporaneous. I never had any idea that anyone would ever go back on that understanding.

As a matter of fact, there we were negotiating for Mr.Fields and Mr.Friedman to continue as officers of this company. What sense would that have made if they were going to be criminally prosecuted. One of the things in the consent decree was that although Mr. Fields had to give up the chief executorship -- I am sorry, he had to cease being the chief executor of the TDA, he still continued to be the president which meant he was the chief operating officer and we had lengthy conversations on how important it was to the company because TDA was made up of a series of subsidiaries, companies that the parent had acquired over the years.

Each of those companies were run by self-made men that had put these businesses together. The one thing that tied them all together was the parent company run by Mr.Fields. What sense would it have made to negotiate that he could stay on as president and at the same moment expect that he was going to be prosecuted the next day. That entire negotiation would have been a waste of time.

Q Do you concede, Mr. Kantor, that Mr.Tucker did not state to you on June January 17 there would be no criminal reference?

A No, that is not what I said and if I gave that impression, I certainly did not mean to. I had a conversation with him. There is no question in my mind that after speaking to him, the sum and substance of that conversation was that the investigation was complete, it contained no surprises and that as the result, assuming that we would work out a proper judgment, consent judgment, that there would be no criminal prosecution.

I don't remember his exact words with the exception of a few phrases, because of the unusualness of those phrases. It was his words when he said 95 per cent complete, and I remember that because I was preparing myself to report to a board and I said to him something to the effect, "Jeff, either it's complete or incomplete. What does 95 per cent complete mean?"

Q I didn't ask you about that.

A You asked me what it was he said on that June 17th meeting. If I gave the impression I did not come away from that meeting or that conversation believing that I had a commitment, thenI gave the wrong impression.

Q You say in the minutes that you reported to the board that anSEC staff member had informed you that the staff would not refer the matter for criminal prosecution?

A Correct.

Q Your testimony here today is that you did not mean to suggest that anyone had said anything to you on June 17, is that what your testimony is?

A That I didn't mean to suggest that anyone said anything to me on June 17th? Quite the contrar y

What I mean to testify to andwhich I hope I am doing is that things were said to me on June 17th on the telephone, specifically by Jeffrey Tucker, the purport of which, the content of which, the contention of which is that there was not going to be a criminal prosecution.

Q When you said in the July 8th board minutes, Exhibit H, page 27, when you said, "A staff member informed me that the staff would not refer the matter for criminal prosecution", you did not intend to convey by that that the staff member had said to you that he would not refer the matter for criminal prosecution?

A You have a lot of negatives in there, Mr.Cutner. Mr.Cutner, I am not sure I can answer yes or no, but if I tell you what I intended to convey to the board and what I in fact did convey to the board, it was that there was not going to be a criminal prosecution and I believed that because of everything that preceded it, and particularly because of the conversation I had with Mr.Tucker that day and after speaking to him, that was my understanding.

And I told the board that. That was also the reason when I found out you had the case, the person I went back to immediately was Jeffrey Tucker.

I couldn't understandhow you had the case and I went to him and asked him did he refer this case and he said to me no, and I told him that I was very happy that he hadn't, because I knew we had an understanding and he didn't say a word to the contrary to me, not on June 17, and not even on my phone conversation -- I am sorry, not even on that latter occasion when I said to him, did you refer it.

If there was any intention on his part not to make me believe that we had an understanding, it seemed to me he certainly would have said something specific to me to disabuse me of that on either of those occasions or on the tens of other times that we met. He knew what I believed.

Q Mr.Tucker did not say to you on June 17 that the staff would not refer the matter for criminal prosecution? He didn't say that to you, isn't that correct?

A In our telephone conversation --

Q You can't answer that yes or no, Mr. Kantor?

A I can't. I can't tell you exactly the words he used on that day with the exception of the 95 per cent.

Q Did Mr.Tucker say to you on that day in substance, we are not going to refer the case for criminal prosecution?

A I can tell you what -

Q Can you answer my question?

A I think I just did.

Q Did he say to you in substance that the staff would not refer the matter for criminal prosecution?

A Yes.

Q He did say that?

A Yes. We had a conversation. I do not recall the exact words as I have said. I think this is the third or fourth time I am testifying to it with the exception of the 95 per cent complete and as the result of what he conveyed to me, the words in substance, I understood there would not be a criminal prosecution, with one exception, we still had to work out the consent decree, but the reason I felt there would be no criminal prosecution, that I felt was within my control because no matter how onerous the decree might be, we could still sign it.

Q What you mean by your statement that Mr. Tucker informed you that there would be no criminal reference, what you mean by that is that that is what you believed?

A That is what I do every day of my life. I hear a person talk, I understand what he says and it leads me to a belief.

THE COURT: Yes, but what is your best recollection? It is a simple question. What is your best recollection as to what Mr.Tucker said on this subject. Did he say there will not be a criminal reference in this case, yes or no?

THE WITNESS: Your Honor, I don't believe he used those exact words, but the sum and substance of what was said was that the investigation did not reveal anything else, there was a proposal which we both understood. This was a necessary part of that proposal being worked out

He was telling me it was 95 per cent so and the other 5 per cent would not change it. There were just odds and ends that had to be done, and that this was the most important step in the completion of that proposal of understanding and as the result of that conversation, I came back and reported to my board that there was not going to be a reference for criminal prosecution.

That plus all the context that surrounded it.

THE COURT: Yes. You viewed, I take it that conversation of June 17 within the context of the discussions and negotiations that had preceded it?

THE WITNESS: That is correct.

Q Your belief on June 17 was based on what had gone before, isn't that so, Mr. Kantor?

A. Everything that had gone before plus what happened on that day.

Q Not on any statement by Mr. Tucker that there would be no criminal reference. That was your assumption, isn't that so?

A Mr. Cutner, I think I have testified that I do not believe that Mr.Tucker said to me in so many words, "Herb, I want you to know that this completes it, there will not be a criminal reference in this case and you can so tell your board." He did not say that that I can recall.

What he did tell me in the context of our original understanding was that his investigation did not show anything other than what we had disclosed. Our understanding had been that if there was no variation of any significance or substance, that the only other thing we had to work out wss a consent judgment and based on that conversation and the substance that surrounded it, I understood there was not going to be a criminal reference.

Q In essence, all Mr.Tucker told you that there had been no surprises so far in his investigation?

A I don't recall his exact words, but he was saying there were no surprises and he was relating that conversation to our original understanding.

Q Wasn't that in essence what Mr.Tucker said, that there had been no surprises?

A It was a part of what he said, yes.

Q Isn't that the essence of what he said, that his investigation was 95 per cent complete and there had been no surprises?

A Mr. Cutner, it's hard for me to say what the essence is. He did say that. He said other things as well. I don't recall the specific language of the other words. I have said, both in response to your question and I think to the Judge's question, that he did not specifically say in exact words, "Herb, go tell your board there is going to be no criminal prosecution."

Q Wasn't it your belief and based on your assumption from Mr.Tucker's statement that there had been no surprises; isn't that what it was?

A Mr.Cutner, I don't think you and I are communicating. Maybe we are having a difficulty in understanding.

My opinion, my belief that there would be no criminal prosecution, because there would be no criminal reference, was based upon the original proposalwhich was fresh in our minds which had been worked on over the previous several months.

My question to him in my telephone conversation related to that understanding. His response of the completion of the status of completion of the investigation was in the context of that understanding and although I don't remember every work that he used, the sumand substance of the exchange give and tak on the telephone was that we had

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Q I will put the question another way, Mr. Kantor. Do you feel you did your very best on June 17th to come to a concise understanding with Mr. Tucker?

A Obviously, since we are sitting here today, whatever was done was not sufficient.

I am not quite sure what I would do if I were in the same circumstance again, having learned from this case.

Q You already testified that you did not ask the understanding be put in writing.

A That is correct. It was my feeling that if I did -- for instance, if the understanding were put into the consent decree and the consent decree were published, that would get to the very agency that we were agreeing not to inform, so that would be destructive.

Q Your answer is no, you did not ask for it to be put in writing?

A I did not ask for it to be put in writing.

Q All right. Did you put a question to Mr. Tucker, "Is my understanding correct that there will be no criminal reference?" Did you ask him that?

A No, because that would only have been necessary if indeed we had some doubts about the understanding. I don't think we had any doubts.

Q You say that things were as precisely spelled out as possible on June 17th?

A Well, I think the fact that we are here today shows that it was not spelled out as precisely as possible. At the time I thought I was acting in a lawyerlike way.

Q It did not occur to you on June 17th to ask Mr. Tucker that question?

A It did not occur to me at any time to say "Do you mean what you said?" We had an understanding --

Q Please.

A Well, sure it did occur to me on one occasion when I found out that you had the case. I went back to Jeffrey Tucker and I said to him, "Did you mean what you said? Did you refer the case?"

And he told me that he did not.

Q Please tell us, Mr. Kantor, when anyone at the SEC ever said to you that there will be no criminal reference in the case. Did someone say that to you?

A As I have testified, the substance of that has been said to me on several occasions, starting from the very first meeting in January when the proposal was made and where no one indicated that the proposal was unacceptable.

We made a proposal. Mr. Moran and his staff were no surprises and he was getting ready to make a recommendation to the Commission concerning civil action.

A "Now we can get down to drafting the complaint, and there will be certain things in it and we will have to try to work out what relief is being requested."

Q And Mr. Tucker never mentioned the words "criminal reference" -- he never mentioned the word "criminal" or "criminal reference" at that point?

A On January 17th.

Q Right.

A I can't say that he did. I am not prepared to say that he didn't.

Q At any event, you did not think it necessary at that time to confirm your understanding that there would be no criminal reference.

A We did not go into any great detail to confirm that understanding, that is correct.

Q My question is, you did not think it necessary at that time to confirm your understanding, Mr. Kantor?

A That is correct.

Mr. Cutner, let me take that answer back. I think I did confirm it -- maybe not in so many specific words, as I said, but the sum and substance I received was that there was to be no reference for criminal prosecution, so I would have to say that as a result of my June 17th conversation I did feel that I had confirmation.

Q You never put the question directly, though, Mr. Kantor?

A I did not.

Q And Mr. Tucker did not speak directly on that subject, did he?

A He did not.

Q Do you have your appointment diary, Mr. Kantor, that you identified this morning?

A I do.

(Witness hands to Mr. Cutner who examines.)

MR. CUTNER: Your Honor, I would like to have a page of June 17, 1975 from Mr. Cutner's diary marked, and I will offer that.

THE COURT: June 19th?

MR. CUTNER: June 17th.

THE COURT: June 17th -- I beg your pardon.

MR. BENDER: Your Honor, can we do the same thing that we did yesterday with Mr. Gould? Could we have Mr. Kantor photostat that?

MR. CUTNER: That is fine.

THE COURT: All right, we will do that.

(Page of June 17, 1975 from Mr. Kantor's suggestion, and that it was my belief that it would be carried out.

And I again reported to the board, so it was reduced to writing after Mr. Tucker's conversation -- that would be the July minutes, but I think that was the only written record of what had transpired that I had made.

Q Just so that we can be precise here, your understanding with the SEC was reached with the staff in the Regional Office, is that correct?

A That is correct.

Q And it was your understanding that the staff would not recommend a criminal prosecution, isn't that so?

A That is correct.

Q And you understood that is not the same thing as having an understanding with the SEC that there would be no criminal reference?

A Absolutely -- Mr. Moran specifically pointed that out in the January meeting, when we were making that proposal. He said something to the effect that he has no power whatsoever to grant a no-prosecution. He does have a discretion, however, to determine for his agency whether or not there would be a criminal reference, subject to the Division of Enforcement approval.

Q When you say "his agency," are we talking about the recommendation of the New York Regional Office?

A Yes.

Q You understand that the Division of Enforcement would have to approve in Washington.

A We certainly did, and we knew we were talking about solely whether or not the SEC would refer the case to the Justice Department.

There were no terms here unqualified that there would be no criminal prosecution, and it is possible thatthe United States Attorney's office might have gotten the case from some other source than the SEC, which I assume had been so when Mr. Tucker told me he did not refer the case.

Q You understood that they had to get the approval of the Division of Enforcement?

A Absolutely. Mr. Moran so indicated.

Q And you understood that they had to get the approval of the Commissioners themselves -- correct?

A In most cases, yes.

Q You understood that to be the case here?

A I understood that if Mr. Sporkin or his designee in the Washington office approved of this, then it would come back to the New York office and it would be done. If he did not approve of it it would not be done.

THE COURT: Mr. Sporkin is not Mr. Sorkin.

THE WITNESS: No.

THE COURT: I did not think so.

THE WITNESS: Mr. Sporkin was the Chief of the Enforcement Division of the SEC.

THE COURT: All right, I just wanted to be sure.

Q Didn't you also know, Mr. Kantor, that the Commissioners of the SEC would have to approve the recommendation of the Division of Enforcement?

A I think the record is such that if Mr. Sporkin recommended it it would be done.

Yes, I believe that there had to be approval by the Commissioners, but normally they rely very heavily on the recommendations of Mr. Sporkin.

Q Your answer is yes, you understood that the Commissioners had to approve?

A My answer is that the decisional process would take place in Mr. Sporkin's office -- if not Mr. Sporkin himself, one of his designees, and that that recommendation would probably finally dispose of it. The Commissioners had to agree but they normally follow his recommendation.

THE COURT: And you are speaking generally, I take it, of a recommendation originating in a Regional

Office, either to have a criminal reference or not to have a criminal reference --

THE WITNESS: That is correct.

THE COURT: Is that right?

THE WITNESS: That is correct, so we were several lines down the line.

THE COURT: And what happens is that the Regional Office, after conducting such an inquiry, either recommends that there be a criminal reference or recommends that there not be a criminal reference?

THE WITNESS: That was my understanding.

THE COURT: I see, and in either event, according to your understanding, that recommendation is reviewed and either approved or disapproved by Mr. Sporkin's section in Washington?

THE WITNESS: That is correct.

THE COURT: All right.

THE WITNESS: Your Honor, there were two occasions where that was required, and on both occasions I was informed that the Division of Enforcement in Washington had done so. But the first one was when we had made our proposal and the question was whether or not the case would remain in the New York office and be conducted in accordance with our suggestion.

The second one was when the final recommendation of the case went through, that the consent decree be accepted, and that, too, had to be submitted to Washington and again I was informed that that was accepted.

MR. CUTNER: May I have this marked as the next Government's exhibit.

(Document marked Government Exhibit 7 for identification.) xxx

BY MR. CUTNER:

Q Mr. Kantor, I am showing you what has been marked Government's Exhibit 7 for identification (handing). Is that your signature on this letter?

A Yes.

MR. CUTNER: Your Honor, I offer Government's Exhibit 7 in evidence.

MR. BENDER: What is the date?

MR. CUTNER: The letter is dated September 17, 1975, addressed to Stuart Perlmutter, and signed Herbert C. Kantor.

MR. BENDER: I have no objection.

THE COURT: Gentlemen?

MR. TIGHE: I have no objection.

MR. NAFTALIS: May I see it?

Mr. Friedman and Mr. Davis, that the best strategy to take was to disclose the District Attorney's investigation to the SEC; is that right?

A I think, although that conversation may have come up, I think that conversation actually preceded that date, because at the meeting of January 3rd I had obtained the permission of the board of directors -- indeed, the direction of the board, to make that disclosure, and Messrs. Paul Fields and Friedman were members of the board who voted for it.

Q And Mr. Gould stated on January 10th that the way to avoid a criminal reference of the case, a federal prosecution, was to bring this matter to the attention of the SEC; is that right?

A Well, it was his suggestion that if we make a full disclosure, if we agree to pay to the corporation all the sums of money which were involved, and if we make certain management changes as requested by the SEC, that that would be a way to avoid a criminal reference of the case.

Q Is it fair to say that you assumed that Mr. Gould knew what he was talking about, Mr. Kantor?

A I have great respect for his opinions.

Q And isn't it true that all that happened in this case was an assumption on your part that the SEC would go along with something that you and Mr. Gould planned prior to the time that you ever went to see them?

A Only if you ignore what happened at the SEC on January 14th, when it was specifically proposed in as direct language as you can make it, and neither Mr. Moran nor anyone declined to go along with it. Indeed, they seemed to do just the opposite. They received it. They said they would act on it. They said they would ask for approval from Washington on it, and I don't understand how you can possibly come to the conclusion that you just suggested.

Q And the subject was never again raised directly until several months after you signed the consent decree?

A I think it was raised directly with other persons, so far as I was concerned -- the closest it came to my conversations were the ones I have mentioned.

MR. CUTNER: I have nothing further of Mr. Kantor.

THE COURT: Gentlemen, redirect?

MR. BENDER: I have a few questions, your Honor.

THE COURT: All right.

Hearing 3d Day

mkm

UNITED STATES OF AMERICA
vs.
DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN, PETER S. DAVIS, ALAN E. SANDBERG.

76 Cr. 1022

New York, New York
April 20, 1977
9:30 a.m.

(Hearing resumed.)

MR. BENDER: With your Honor's permission, may my partner, Mr. Frankel, conduct the examination of the next witness or two?

THE COURT: By all means.

C. LEONARD GORDON, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

xxx BY MR. FRANKEL:

Q Mr. Gorden, what is your profession?

A I am a lawyer.

Q Are you admitted to the bar of the State of New York?

A Yes, I am.

Q When were you admitted?

A 1955.

Q Are you admitted to the bar of this Court?

A Yes.

Q With what firm are you associated?

A The firm of Gordon, Horowitz, Butowsky, Baker, Weitzen & Shalov.

Q Are you a partner in that firm?

A I am.

Q How many attorneys are partners or associates in that firm?

A Twenty-four.

Q Do you know the defendant Douglas Fields?

A Yes, I do.

Q Are you familiar with an entity by the name of TDA Industries?

A Yes, I am.

Q In or about October of 1975, did you have the opportunity to serve on the board of directors of TDA?

A In October of '75 Doug Fields called me and asked me if I would be interested in being a court-appointed director of TDA.

Q Did he tell you anything about any then pending investigation being conducted by the SEC?

A Yes.

Q What did he tell you?

A He told me that there was an investigation.

He asked me if I knew about it, and I told him I had read about it, I think in the Law Journal -- and he told me that they were -- that they had a deal to enter into a consent judgment and it was going to involve his not being a director and the Court appointing about thirteen directors, and asked me if I would be interested in serving as one of the directors.

Q What was your response?

A I told him I wouldn't be in the slightest bit interested in being a director of the company, that I had a client who might be interested.

Q What was that client's name?

A John Mosler.

Q Will you briefly state for us who John Mosler is?

A John Mosler was, I think, the great grandson of the founder of the firm of Mosler Safe Company, and a former president and chairman of the board of Mosler Safe. Mosler Safe had been sold to American Standard, and he was at that time in personal investments, and he had been the court-appointed --a court-appointed director of International Controls Company, after the International Controls had entered into a consent judgment with the SEC providing for the appointment of five directors. Mr. Mosler was one of those five directors, and had been elected the chairman of the board of International Controls, a caretaker board.

Q After you suggested Mr. Mosler's name to Mr. Fields, what did Mr. Fields say?

A He said that he would be interested and I should look into it.

Q Did you then have a conversation with Mr. Mosler?

A Yes.

Q Did you then have a conversation with Mr. Fields?

A Yes.

Q What was your conversation with Mr. Fields?

A I told him that Mr. Mosler was interested in it; that he would have to get compensation that would be adequate to have him devote the kind of time that would be required to being a director.

I suggested an office and a secretary and $10,000 a year, and I told him that I was troubled by the fact that he was not --that Doug Fields was not going to be on the board, and if my client was going to be on the board and have the liability of a director I wanted Doug Fields, who was the controlling person, to be on the board and have the same liabilities and responsibilities, and I was also troubled by the number of directors on the board because I felt that each director would have to be paid enough money to induce him to spend the kind of time that is required to be a good director of a public company, and that it was going to be costly and cumbersome, and I also told him that MR. Mosler's business involved securities and that I had to be -- that there had to be no criminal prosecution following the SEC civil compaint, and --

Q When you say Mr. Mosler -- when you mentioned "securities," what do you mean by "securities"?

A Safe -- the safe business and he was a consultant -- expected to be a consultant in businesses involving security, that is, the safeguarding of things, and in that business you cannot have any involvement or connection with criminal matters, and it was that same importance to Mr. Mosler, which had been raised in my conversation with him -- Mr. Mosler.

Q When you stated that latter concern to Mr. Fields -- incidentally, are we around -- what period of time are we in this conversation, as best you can recall?

A October.

Q Of 1975?

A Yes.

Q When you stated this latter concern to

Mr. Fields, what did he say?

A He said that they had a deal that there would be no criminal reference -- that that was part of their deal.

Q Did he say that deal was with the SEC?

A Yes.

Q What did you say in response to that?

A I said I would like to talk to his lawyer.

(Continued on next page.)

Q For what purpose?

A To ascertain what the nature of the deal was.

Q Did you state to him anything in connection with your wanting to verify it with the SEC?

A Yes.

Q What did you say to him?

A I said I'd like to talk to the SEC staff, also. I think I said that after I talked to -- he suggested I call either Gould or Kantor.

Q Who did you then call?

A Kantor.

Q Would you relate that conversation?

A I talked to Kantor and I don't really remember the substance of it except he verified that, we went over the facts of the complaint, the facts as he knew them, in some detail. And he did verify that what the form and structure of the proposed consent judgment was, and he also told me that as part of the deal there was going to be an assurance of no criminal reference.

Q Did there come a time when you attempted to verify that again with attorneys for the SEC?

A Yes.

Q Did you attend a meeting with any of those attorneys?

A Yes.

Q Do you recall how that meeting was set up?

A Yes.

Q Are we still in October '75 roughly, by the way?

A We are in October. We could be into November. I think we are still in October, though.

Q How did that meeting get set up?

A I asked my law partner, David Butowsky, to set up an appointment with the SEC.

Q Did Mr. Butowsky have any previous experience with the SEC?

A Yes, Mr. Butowsky was the chief enforcement attorney at SEC in Washington for a number of years and he had also -- and I had met him when he was the Court-appointed special counsel to International Controls.

Q On whose recommendation did he become special counsel, if you know?

A The SEC.

Q Did Mr.Butowsky set up a meeting at the SEC?

A Yes.

Q Who was present at the meeting?

A Mr. Perlmutter and another gentleman who I believe was an investigator fellow, not a lawyer.

Q Do you recall his name?

A No.

Q Who else was present?

A There were other people who popped in from time to time to, mostly to say "hi", and talk to Butowsky, not about our matter, I might add.

Q Were you and Butowsky present?

A Yes.

Q Was this the first time you had met Mr. Perlmutter?

A Yes.

Q Was it the first time you had spoken to Mr. Perlmutter?

A Yes.

Q Did you explain to him the problem --

A I am not sure it was the first time. I think Butowsky set up the whole meeting. I might have called to confirm the meeting. I just don't remember. It's the first time I spoke to him at any length, that's for certain.

Q Did you tell Mr. Perlmutter why you had asked for the meeting?

A Yes.

Q What did you say to him?

A I said that we were representing John Mosler. That John Mosler had been asked to serve as one of the Court-appointed attorneys -- director -- pardon me -- one of the Court-appointed directors of TDA and that we were there representing Mr. Mosler to find out about the complaint and the transaction and the whole matter.

Q Did you discuss with him any or all of the three concerns that you referred to previously, that is with reference to the number of directors, with reference to Mr.Fields remaining as a director, and with reference to the issue of whether there would be a criminal reference?

A Yes, I discussed all three.

Q What did Mr. Perlmutter say with reference to each of those three matters?

A He was not interested in, was not persuaded, I should say, or did not appear persuaded by my arguments that Fields should be on the board, that it was no punishment to have him off the board, that he was the controlling person of the company and I was concerned about my client serving as a director when a non-director might in fact be calling the shots of the company. I thought that was a serious concern. He was not impressed. He was also not impressed by my concern that 13 directors were, was cumbersome and onerous.

I asked him, I told him that it was important to John Mosler. The last thing I brought up, was the criminal reference.

I told him it was important to Mr. Mosler that there not be a criminal reference and I understood that there was not going to be a criminal reference in this matter. He in substance assured me that there was not going to be a criminal reference.

Q Subsequent to that meeting did you report on it to Mr. Mosler?

A Yes.

Q Did youtell him that the SEC attorney had confirmed to you that there was not going to be a criminal reference of this matter?

A Yes.

Q Subsequent to that meeting with the SEC did you speak with Douglas Fields about the meeting?

A Yes.

Q Did you tell him that the SEC attorney had confirmed to you that there was not going to be a criminal reference of this matter?

A I don't, I don't recall. I think I did. I am not sure.

Q Were you interviewed in connection with this, your testimony today,by Mr. Cutner?

A Yes.

Q Did you answer whatever questions he had asked of you?

A Yes.

Q Did you on or about --

A An interview on the telephone,I should say.

Q Did you on or about March 7,1977, sign an affidavit at the request of Mr.Bender and myself relating substantially the matters that you have testified to?

A Yes.

Q Did Mr.Cutner ask you for a copy of that affidavit?

A Yes.

Q Did you send him a copy of it?

A Yes.

MR. FRANKEL: That is all, your Honor.

THE COURT: Mr. Naftalis?

MR. NAFTALIS: No questions, your Honor .

THE COURT: Mr.Wright?

MR. WRIGHT: No questions.

THE COURT: Mr.Tighe?

MR. TIGHE: No, your Honor.

THE COURT: Mr. Cutner.

CROSS-EXAMINATION

BY MR. CUTNER:

Q Mr. Gordon, when did you become associated with

A Upon graduating from the Harvard business school, I joined the firm of Lehman Bros., investment banking firm down here, nearby in the financial district, as an investment analyst, among other things. Six months later I joined the small American Stock Exchange Company named Tally Industries, Inc., headquartered in Mesa, Arizona, as assistant to the president, and twenty months thereafter I founded a company which is now called TDA Industries, Inc.

Q In 1974 what was your position with TDA Industries, Inc.?

A Chairman of the board of directors, chairman of the executive committee, and president and chief executive officer.

Q Did there come a time in 1974 when you were told that the District Attorney of New York County was investigating certain matters involving TDA and Westcalind Corp.?

A TDA Industries, Inc., and Westcalind Corporation predecessor Monarch Eleectronics International, Inc., yes, sir.

Q When were you so advised, approximately?

A As to TDA Industries, Inc., in March, 1974.

As to Westcalind Corporation at around approximately May 1974.

Q Did you retain counsel in connection with that investigation?

A Yes, sir.

Q Who was that?

A I retained Mr. Milton Gould of the firm of Shea, Gould, Climenko & Kramer at that time.

Q In 1974 did you know Fred Friedman?

A Yes, I did.

Q What position did he hold with TDA?

A Director, financial vice-president, chief financial officer, treasurer and secretary.

Q Did he also retain counsel in connection with the District Attorney's investigation?

A Yes, sir.

Q Who was that?

A Mr. Milton S. Gould of the firm of Shea, Gould, Climenko & Kramer.

Q Did there come a time when it was recommended to youand Mr.Friedman that disclosure of the matters being investigated by the District Attorney's office be made to the Securities and Exchange Commission?

A Could you read that back?

(Recess.)

THE COURT: Some sort of plate was being removed from the floor above us and the work will be done instead between 1:00 and 2:00 in the afternoon. I must say it furnishes dramatic evidence of the Federal judiciary. How often have any of you had banging over your head and wished with one simple phone call you can make them stop. That's what I just did.

All right, Mr.Frankel.

MR. FRANKEL: May we have the last question reread, please,your Honor.

(Record read.)

A Yes.

Q Do you recall when that recommendation was made to you and to Mr.Friedman?

A We were informed during 1974 that we would make a disclosure to the Securities and Exchange Commission.

Q Do you recall when that was?

A I believe that we always had the intention to make such a disclosure and we were, the decision was made by the attorneys that the disclosure should be made in the -- toward the end of 1974.

Q Who were the attorneys who made that decision?

A Mr. Milton Gould.

Q Were you and Mr.Friedman advised as to the reason for making a disclosure?

A We were advised --

Q Let me rephrase the question. Was there stated to you by any -- you and Mr.Friedman -- by any of the counsel you have mentioned what the primary objective in making such a disclosure would be?

MR. CUTNER: Your Honor, could we have a foundation as to who is making this, giving this advice?

THE COURT: The only lawyer identified so far according to my notes it Mr. Gould.

Q Did Mr..Gould advise you of what the objective would be of making a disclosure to the SEC?

A Mr.Gould advised us that at the time that he believed that the District Attorney's investigation was substantially complete,.that we would then take -- and we should then take the matter to the Securities and Exchange Commission and disclose, for the purpose of disclosing the matter to them in order to avoid a criminal reference of the matter to the United States Attorney's office, and I might add, also, too, it was his opinion that the matter should be disclosed to the Securities and Exchange Commission.

Now he might have had other reasons.

Q I am just asking what he said to you. Did he indicate who would be the referring party if there were to be a criminal reference that he was trying to avoid? Was he referring to the SEC?

A Yes. It was his intention that when the District Attorney's investigation was substantially completed in his opinion that he would refer, take the matter, disclose the matter to the Securities and Exchange Commission and in so doing would attempt to reach an understanding with the the Securities and Exchange Commission that they impose what sanctions they felt would be required to settle this case, so that it wouldn't require any further criminal investigation by other agents, namely the United States Attorney's office.

Q Did he state this to you and to Mr. Friedman?

A Yes, sir.

Q Did you and Mr. Friedman authorize him to make a disclosure to the SEC?

A Yes, sir.

Q Did there come a time when you received a report of a meeting that was held among Messrs.Gould, Kantor and attorneys for the SEC on January 14, 1975?

A Yes.

Q From whom did you receive a report of such a meeting?

A I received such report from Herbert C. Kantor and from Milton Gould.

Q Did you receive those reports on or about January 14 or 15?

A I received those reports on January 14 and January 16, I believe.

Q Did you receive a separate report from Mr.Gould and from Mr. Kantor?

A Yes, sir.

Q Were the reports substantially the same?

A Yes.

Q Would you tell us the substance of what was reported to you on the14th and the 16th by Mr.Kantor and Mr. Gould?

A Could you define "substance"? I could tell you --

Q Without quoting words what did they say had transpired?

A In total?

Q The best you can recall it.

A Okay. Mr. Kantor advised me that he and Mr. Gould entered a room at the Securities and Exchange Commission and met with Mr. William Moran who was the head of the New York or Northeast regional office of the Securities and Exchange Commission. He says that Mr.Gould and Mr. Moran met each other like long lost buddies. He said that

Mr. Gould and Mr. Moran entered into friendly banter. He told me that shortly thereafter five additional members of the staff to the SEC in the New York office entered the room.

He told me that shortly after that they began to discuss the matter that they had gone to Mr. Moran and to discuss. He indicated that, or he said in fact, that they had made a proposal at that meeting to the Securities and Exchange Commission that they were voluntarily disclosing certain matters which were the subject of an investigation by the New York County District Attorney's office and that in doing so they were seeking to arrive at an agreement or an understanding in which the SEC would investigate these matters with the objective of entering into a satisfactory mutually agreeable,civil recommendation for the purpose of avoiding any criminal reference by the SEC to the U.S.Attorney's office.

In other words, an understanding which would be so comprehensive that it would entail whatever civil recommendations the SEC was then seeking in cases of this sort, which would, if agreed to by us, namely Mr.Friedman and myself and TDA and Westcalind Corporation, be such that the SEC would agree not to refer the case for further prosecution by the United States Attorney's office.

Q Were you told what response if any was given by anyone on the SEC side of the table?

A We were told, I was told as well as Mr.Friedman I might add, that Mr. Moran indicated or said that this was something that he was agreeable to, but that he would have to check this with the Washington office to determine if he could proceed along these lines and that the investigation would have to not contradict the subject matters in substantial degree that were being basically referred to the SEC by Mr. Kantor and Mr.Gould.

Q Did there come a time when you were advised that approval had been received from Washington?

A Yes, there did. There came a time that approval had been received from Washington that they would proceed on this basis.

Q Do you recall about how long after the report of the January 14th meeting this was said to you roughly, Mr. Fields?

A Within a month or so, certainly in February.

Q Did there come a time that you were advised that the SEC had completed or substantially completed its investigation?

A Yes.

Q When were you so advised?

A That was in June, 1975.

Q Who advised you of that?

A Both corporate counsel, Mr. Kantor, and our personal counsel, Mr.Gould.

Q Do you recall what they said to you in that connection?

A Mr. Kantor said, and perhaps I should give a little bit of detail on the background of this the way the two attorneys seemed to me to be handling the matter, Kantor developed or it was his objective to develop a rapport with the various staff members of the SEC as he was going to be doing all of the carrying the laboring law in supplying the SEC with all the information that they requested. Kantor thereafter -- and Kantor also told me things in some great detail about each of the individual people that he spoke with at the SEC.

So on that basis Kantor told me that he had specifically spoken with certain individuals and that they had said that their investigation was complete, and he did use the term 95 per cent, to which I asked him, "You mean, what does 95 per cent mean? Is it 100 per cent or what?"

He said,"No, that's substantially complete. There is really nothing more for them to go into."

And he advised me that they had discovered in their investigation no substantially greater problem areas than had been initially referred to them by Mr. Kantor and Mr.Gould, and that they had now completed their investigation and intended to make and would not make any criminal reference of the case or -- to put it another way -- they were now going to write up a report to Washington seeking to file a complaint against us which would be simultaneously settled by a consent if we were able to arrive at mutually agreeable terms, and that the report to Washington would contain no recommendation for a criminal reference.

And that there would be no criminal reference made by the SEC.

(continued on next page.)

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Q Did Mr. Kantor tell you that he was reporting a specific conversation that he had had?

A Yes.

Q Did he say who he had had that conversation with?

A Ye[illegible] reported that he had the conversation with Jeffrey Tucker. Tucker at that time was, to my knowledge, the senior individual on the matter.

Q Was the report of that conversation, to your knowledge, given to Mr. Friedman?

A Yes, it was.

Q Do you know who gave it to Mr. Friedman -- who gave that report to Mr. Friedman?

A Wait a second. We still haven't finished the second part of the question that you asked three questions ago.

That report was given to Mr. Friedman by both Mr. Kantor and Mr. Gould as well.

Q Was Mr. Kantor's report given on the phone to you or at a meeting?

A Initially on the phone, and also at a meeting.

Q Was Mr. Friedman at that meeting?

A Yes.

Q Were Mr. Kantor and Mr. Gould at that meeting?

A I believe that when we met with Mr. Gould Kantor was also there in general.

Kantor would give us a report virtually immediately when he talked with the SEC.

We got our reports from Gould, generally speaking, in meetings.

Q Was the report that you got at the meeting in Mr. Friedman's presence substantially the same as the report that you had gotten from Mr. Kantor, which you just related to us?

A Yes. I think this was one of the few times where Gould actually initiated the call to me, to set up a meeting because he had some very important information to disclose to us.

Q Were you present at a meeting of the board of directors of TDA on July 8, 1975? That is the meeting -- we are trying to put our hands on the exhibit.

(Mr. Frankel confers with Mr. Bender off the record.)

Q Were you present at a meeting, the board meeting of July 8, 1975, which has been introduced in this hearing as Defendants' Exhibit H, and about which Mr. Kantor testified yesterday?

A Yes, I was, as was Mr. Friedman.

Q Were you in the courtroom yesterday when Mr. Kantor testified?

A Yes, I was.

Q And did you hear being read to Mr. Kantor the excerpt from his minutes to the effect that Mr. Kantor reported that on June 17, 1975 a member of the SEC staff had informed him that their investigation was 95 percent complete and that his staff would not refer the matter for criminal prosecution?

A Yes, I was there.

Q Were you present -- and was Mr. Friedman present at the board meeting as well?

A Yes, he was. A number of directors were.

Q Was that statement made by Mr. Kantor at that board of directors' meeting?

A Yes, it was.

Q Did you sign a consent to the entry of the final judgment in the civil matter on or about December 10, 1975?

A Yes, I signed such a document.

Q Between June of 1975 and December of 1975 were reports given to you and to Mr. Friedman of negotiations being conducted between attorneys for the SEC and Messrs. Gould and/or Streit and/or Kantor concerning the

Q Specifically, did you receive -- I want to get into a few of those,Mr. Field -- did you receive a report concerning a meeting held at the SEC on September 4, 1975?

A Yes, I did.

Q From whom did you receive the report?

A I received the report from Mr. Kantor initially, and subsequently in a meeting with Mr. Gould.

Q Who were present at the meeting with Mr. Gould?

Strike that.

Was Mr. Friedman present at the meeting with Mr. Gould?

A Yes, sir, he was.

MR. NAFTALIS: May we have the others who were present? I think Mr. Davis was present at that meeting. It would save me some questions.

Q If you can recall who was at the meeting on September 4th, will you tell us?

A Well, Mr. Davis was generally not present at the meetings that I had with Mr. Kantor, although he was present at a number of them.

With regard to Mr. Gould, Mr. Davis was present at many of these meetings as well, up until about this time I would say, but in 1974 Davis definitely was at the meeting if I was at the meeting, and in '75 less so.

Q Now would you direct your attention --

A To the other people?

Q -- to the report given to you of the meeting on September 4th, when was that report given to you?

THE COURT: I am sorry. Is this the report of the meeting on September 4th involving other people or is this a September 4th meeting where the witness received a report?

MR. FRANKEL: It is a report of the September 4th meeting.

THE COURT: All right.

Q When did you receive it?

A It was a report of a meeting held by our counsel with the SEC on September 4th.

THE COURT: All right.

A (Cont'g) As reported to me.

Q When was the report given to you?

A The initial report of that meeting to me was on the telephone from Mr. Kantor.

Q Was the telephone call made on September 4th, if you recall? Was it the same day or shortly thereafter?

A Yes. I cannot place the time of the meeting on September 4th that he had with the SEC.

Q Mr. Fields, I am not asking you for the time.

A Well, if I knew the time -- it was, I believe, the same day or the next day -- I believe it was the same day. Frequently I would talk with Mr. Kantor at his home in the evening, if necessary.

Q Did you also receive a report of a September 4th meeting at a meeting?

A Yes.

Q When was that meeting?

A I believe it was September 11th or thereabouts.

Q Who was present at that time -- where was that meeting held, first?

A That meeting was in the large conference room at Shea, Gould, Climenko & Casey.

Q Do you recall who was present at that meeting?

A Judge Streit, Milton Gould, Frederick Friedman, Herbert Kantor, Edward Lampert and me.

Q Do you recall what was reported at that meeting and by whom concerning the September 4th meeting?

A Mr. Gould, who arrived at the meeting a few minutes late, made the report.

Q What did he report about the meeting of September 4th?

A He basically reported on five categories, as

I recall.

He reported that he had spoken with the SEC and that he had received permission to enter into a negotiated settlement of a complaint that was to be filed in this matter, and he had -- I might say during the summer he had advised us that this was going to happen.

He first started out by telling us sections of the various Securities Laws, 1933 and 1934, that the SEC wanted to sue us, and he mentioned a number of those.

We objected to many of them. He responded by telling us that it didn't matter what the sections were because if our concern was signing a consent with regard to certain sections in our minds meant something that might later result in civil lawsuits against us, that any lawyer that would sue us on those matters would not refer to the consent but would look to the underlying facts.

On the second category -- I don't know if I am giving them in order, and so therefore we got off that point.

He said "Whatever sections they are, I want authority," you know, to consent to.

One of the sections that he mentioned was that Davis would have to sign -- go through a 2(e) proceeding, or something to that effect.

Another one -- oh, he asked us -- he wanted -- which is really the bulk of it -- he wanted us to authorize him to negotiate a dollar settlement, and he said that the SEC was going to be looking for $400,000 to be paid to TDA Industries, Inc. in connection with a stock transaction that had occurred previously and was a subject of the SEC investigation.

He said that he wanted us to authorize him -- I am sorry. He said that the SEC told him they wanted us to pay $35,000 in connection with a finder's fee in 1971.

He said something about a finder's fee involving Eagle Roofing, which I am not so sure that he indicated that the SEC had finally, you know, decided what to put in about that -- I am not sure.

He wanted us to authorize him to negotiate a settlement on these dollar amounts up to as high as $250,000.

You are interested in what we said then?

Q Yes.

A We advised him that that was both unreasonable and unfair.

Q I don't want to go into all of what he said but let me ask you this --

A Okay.

Q -- with respect to that, if I may, Mr. Fields --

A Yes.

Q -- did you indicate acquiescence immediately to the $250,000 figure?

A No. That consumed a substantial amount of time.

Q Did you tell him, in substance, that it was far too high?

A Yes. We told him, in substance, it was far too high, and he said in his opinion that it was an outside number -- that he just wanted authority to go that high if he had to.

Q Did you give him that authority at the end of the meeting --by the end of the meeting?

A Yes. I think Judge Streit characterized it well when he said that they used violence.

Q What other areas, if any, on what the SEC would be looking for were discussed at that meeting?

A There was one other area, and I am not so sure if it had to do with the reorganization of having additional directors or our voting rights.

There was a fifth area. It was the primary thing at the end which really was the way -- it was the primary -- Gould stated that he was looking for the settlement in order, to use his term, save our lives, and that his primary objective was to avoid a criminal reference, and all the rest of the stuff we were talking about dollars.

That's the major climax of the meeting, really, but there was another area, I think, of specifics in the consent that we discussed.

Q But you don't recall right now.

A I do not.

THE COURT: Judge Streit's reference to using "violence" is something of an exaggeration, surely, is it not? You are not suggesting that they beat you?

THE WITNESS: No, but his reference -- I don't think he was referring to it literally either, but when it came right down to it he said -- well, I don't know if I should use the language that I recall, but the object in the entire subject -- his primary objective was if we don't authorize him to enter into the settlement that this case is going to be referred to the U. S. Attorney's office and they will be running all over everybody and the company might as well be flushed right down the drain, and for this kind of settlement he wanted authority to do this in order to avoid a criminal reference.

Q Did he make any reference to any agreement or understanding with the SEC during the course the conversation or of the meeting?

A Yes.

Q And what did he say with reference to the agreement or understanding?

A Well, he told us that he had taken us through the New York County District Attorney's investigation -- they had investigated all of the same matters; that he had referred it to the Securities & Exchange Commission, as he has many other cases in the past, and that he has carried that through -- through the investigation, et cetera, and he has gotten this agreement and he thought we were out of our minds to blow it by not entering into a settlement satisfactory to the SEC, and he said "Under no circumstances if we did not enter into a satisfactory consent this case was going to be referred to the U. S. Attorney's Office."

Q With respect to the various items covered in that meeting that you have enumerated, did you offer any resistance to all of them? Did you offer resistance to each of them?

A Yes.

Q And was this statement about blowing the deal by not agreeing made in response to your resistance?

A On some of the points he said they were meaningless, that we shouldn't give a damn about them. On some points, for example, he said on the matters on which sections are involved specifically, he said what they were going to ask for us to sign a consent not to violate sections 5(a), I believe 5(c), and I think 17.

We told him that that was absurd, we were not familiar with any of those kinds of things.

He said it didn't matter. We got off that point. We objected to every single point.

Q Was it with reference to each of those objections that Mr. Gould said "If you don't agree you are going to blow the deal"?

A "Blow the deal" is not his term.

Q I'm sorry. Do you recall in substance what he said?

A That is in substance what he said. He said that if we don't sign, if we don't enter into a satisfactory consent with the SEC, that they are going to refer the case to the U. S. Attorney's Office, and if we do enter into a consent we are going to be saving our lives by not having the U. S. Attorney's Office come into the case. After the District Attorney's Office investigated it for a year and the SEC investigated it for a year, and there would never be an end to it, and the way to end it was to enter into a satisfactory consent and avoid a reference, and that he had gotten an agreement that that would be the case.

Q Is that an agreement that he had gotten from the SEC that he was referring to?

A That was an agreement that he had gotten from the SEC, and on many occasions, including this one, he indicated that that was the procedure in many cases of this kind, where there was a payment to the corporation of whatever funds were being claimed, and that a consent was satisfactorily entered into along the lines that they were going to go.

Q Did he say on these other occasions that he had entered into agreements with the SEC to that effect?

A Yes.

Q And was he referring to the possibility of a criminal reference during this meeting and urging you to authorize him to negotiate pursuant to the terms you have already described -- was he referring to an agreement that he had reached with the SEC?

A Yes, sir.

Q And did there come a time when you received the report of a meeting held between your attorney and the SEC attorneys, a meeting that had occurred on October 15, 1975?

A Yes. We had -- we got the report of a meeting that was held on October 15th.

Q Do you recall when you got a report of such a meeting?

A I think we got that report of such a meeting around the same time.

(Continued on next page.)

Q Who gave you the report, if you recall?

A I'm trying to think. I know we got a report from Streit, Judge Streit. I'm trying to think if we also got a report -- we definitely received a report from Judge Streit.

Q What was reported to you? Who got the report by the way, and where was it given, if you recall?

A I am not sure -- absolutely certain, but I think we got the report in the small conference room at Shea, Gould. Friedman and I, by Judge Streit.

Q Was anyone else present that you can recall?

A I believe so. I believe there were a number of other people present besides Fred, of course. Perhaps Kantor was there. I believe that he was there.

Q What was told to you on that occasion about the meeting held on or about October 15?

A Well, just, now, this is really off -- I don't have a very detailed recollection of this. What we were told is I believe that of course they had negotiated with the SEC. They had met with the SEC, I know, on September 30, and I think they had other communications with the SEC.

At this meeting we were told that the amount of money that we would have to pay -- at this meeting or within a week of this meeting, maybe within a week after this meeting, we were told that we would have to pay all of the money that was involved in all of these matters that were the subject of the investigation in spite of -- oh, let me just tell you something else.

It was around this time that we learned that Stanley Schulman was dead, which is important, because now we were being told that the SEC was demanding that we pay all of the money which the SEC itself had advised our attorneys that we had not, you know, seen any part of it.

Q But that Schulman had?

A But that they said that Schulman had it, and he had died with it, and that we were now going to have to pay money to TDA which was a pure profit in full.

Q At the meeting --

A And then we had a big problem at this meeting because Fred Friedman, we were first of all told that the amount of money that was now being discussed was not a maximum of 250,000. It became a maximum of five hundred some odd thousand, and we were told that if we wanted to avoid a criminal reference in this matter that we were going to have to come up with all the money or at least that is what they said that we were going to have to do.

Q Were you told at this meeting whether or not any of your attorneys had infact agreed on your behalf to pay that sum of money?

A I am not sure if it was on this meeting but in around this time Judge Streit had gone down to the SEC and told them that we would pay all of the money, that we would --

Q Referring to what sum of money?

A We would pay $585,000 in order to avoid the criminal reference if that is what it took to do the deal, and basically from what I understood what he said to the SEC was that he walked in to what was supposed to be a deposition and he said, "Okay. we are going to give you the $585,000 since there's going to be no criminal reference".

Q Had you authorized the making of that statement?

MR. FRANKEL: I withdraw the question.

Q Were you told anything else about what the SEC had requested or asked for at that meeting?

A Well, the SEC was asking for us to be removed as officers and directors both, all officerships by that I mean, not just the chief executive officer. They were asking that we not vote our shares. They were asking that -- by the way, which is not now, they had been asking for this for a while.

They asked that we not vote our shares of stock in the company. They asked that the board of directors be composed of 15 of which six would be selected jointly with the SEC and approved by the Court and they asked that we sign a consent.

Q When you were told of these requests or conditions of the SEC, did you offer resistance to them, to your attorney who was telling this to you?

A Well, this meeting in around the middle of October was when we had learned that we were now obligated for $500,000.

Q Mr.Fields, do me a favor, try to answer my questions.

A Okay.

Q I think I know what I am doing.

A Yes, we offered resistance.

MR. CUTNER: Your Honor, I haven't objected yet,but I do object to these characterizations. I think Mr.Frankel should ask him what was said.

MR. FRANKEL: I don't know that Mr.Fields can recall exactly how he offered resistance. I don't think that that is an ambiguous term.

THE COURT: I think it preferable that he recount the conversations as best he can.

Q Will you tell us what you said in response to those statements of what the SEC was asking for?

A The meeting was basically focusing now on the question of dollars.

Fred Friedman told Judge Streit that he couldn't come up with the money. My initial reaction was to Judge Streit that I could come up with the money and that if necessary in order to avoid the criminal reference, I will guarantee borrowings by Fred Friedman.

I subsequently withdrew that statement that I would not. I told Judge Streit that I would not guarantee Fred Friedman's borrowings because of certain personal situations that I was involved with. Judge Streit told Fred -- well, sir, the way the meeting ended was that Judge Streit told Fred that if he wants, if he doesn't come up with the money then this -- then his case is going to be referred to the U.S. Attorney's office, and that he better go back and find a way to come up with it.

I told Judge Streit at the end of that meeting that he should be of the opinion that if he is asked that Friedman will come up with his share.

Another thing that was important in this meeting, also, was that what the SEC wanted was that there would be joint and several liability for the money.

I told Judge Streit that if there is joint and several liability for the dollars that I am ready to go to the U. S. Attorney's office with this case because I was not going to take it on a joint and several basis.

I said, "If that's the case, Judge, if you don't get that revised, then let's forget about this consent and we will go to the next step."

Because I was not under any circumstances going to go on a joint and several basis, and that is not because of Mr.Friedman either.

Q Did you have a meeting with your attorneys a day or two before the consent was signed by you on December 10?

A Yes.

Q Where was that meeting?

A In Mr.Gould's office.

Q Who was present?

A Judge streit, Mr.Gould, Herb Kantor, Fred and me. It might have been in the small conference room, but I think it was in Mr. Gould's office.

THE COURT: I'm sorry, who was there?

THE WITNESS: Judge Streit, Milton Gould, Fred Friedman, Herb Kantor and me. In fact, I really think it was in the small conference room.

Q What was the purpose of that meeting?

A The purpose of that meeting was to go over the revised consent.

Q When you say the revised consent, what are you referring to?

A We had asked Milton Gould or Judge Streit to make, to see if certain changes could be made in the draft that we had gotten in the end of October, beginning of November. We also, among those of course was what I had just mentioned to you very vociferously about joint and several. Gould was, Gould and Streit were reporting to us whatever changes were made. In addition, they were presenting to us a document that they wanted us to sign, and we were, we took the opportunity I might say, to ask them questions about it.

Q Was this the meeting shortly before December 10?

A This meeting shortly before December 10th was held on December 9th.

Q What was said at that meeting?

A By?

Q Anyone. What was discussed at the meeting as best you can recall?

A Well, the meeting I think I have related what was discussed. We discussed what Streit and Gould had been able to, and Kantor really for that matter, had been able to do with regard to the original draft of the consent. What they had been able to achieve by way of modification, and what the SEC had accepted and what they didn't accept and what we would have to sign and they gave us a draft to sign.

Q Was there any reference at this meeting or at any other conversations that you had to the third paragraph of the consent?

A The consent being the last two pages, in other words, not the judgment part?

Q To the paragraphs stating in substance that there were no promises or --

A Well, as I recall it there were three paragraphs on that page and the beginning of the fourth. I asked Gould about the first paragraph and he said that it was okay. I then asked Gould about the second paragraph because I think that paragraph had something in it about admitting or denying or something to that effect, and I knew that in some of the consents there was language added that said solely for the purpose of this investigation.

Gould told me that that wasn't very useful to put in those words. In fact, he said it wasn't useful. He also said that this consent would not be fully the end of every single possible conceivable subsequent action because it did not include the reference to Mr.Davis' problem with regard to 2E, but tha tother than that it was completely dispositive of it.

The third paragraph has the information with regard to whether or not there had been any threat or promise and I asked Mr.Gould, what exactly that mean in terms of what, why is it there. And he answered that question in the same way that he answered the question with regard to the following paragraph.

He said that in all the years that he has been entering into consents that this language, this type of boiler plate was in all of his consents. He said that he in fact in the fifties was involved with creating this type -- he gave us a long scenario on it. He told us that in the fifties -- basically the SEC had no real type of recommendation on its own.

And that the SEC -- and he had worked with the SEC in developing a method for the SEC to obtain sanctions. He said that the SEC did not have the power of the U.S. Attorney's office to indict anybody, but that in order to dispose of SEC cases the SEC had to develop some kind of a methodology to sanction people.

And he had worked out in the fifties with the

SEC or along with them, or whatever was being done in the fifties, that created this type of technique of a consent, that he had worked out a way that the SEC in and of itself and within itself, its own organization, could sanction people and they did it by having this kind of a consent judgment, really. That the fact that this language was in there derived from ancient usage, you know, according to him. Usage that had been always in there, and he gave as an example, also the following paragraph, because I asked him, I said, "What does this mean where we have to be subject to depositions if subpoenaed by the Court"? Because, I said, "Well, doesn't that mean that , aren't you subject to them anyway?"

And he also gave me what I believed to be a very satisfactory explanation of that point. And he told me that there was, as far as we were concerned, there was absolutely no concern that we should have on our part that the fact that that statement was in there, that it would have, that it did not refer to, and did not relate to the promise that we had gotten from the SEC that there would be no criminal reference of the matter.

Q Between June and December of 1975, other than the specific conversations and meetings that you have related so far, did you get other reports concerning the progress of the depositions?

A Is that from when, June?

Q Make that between September and December, did you get other reports?

A Yes, we did. When I say when I mean Fred Friedman and myself. I, I in fact when I said "we", I mean Fred Friedman,myself and the other directors, people at TDA.

Q Were the terms that the SEC was asking for related to you during those other occasions?

A Yes.

Q Did you indicate non-acquiescence to those, initial non-acquiescence to those terms when they were related to you?

A Well, the demands kept building up really. We knew from Day 1 that we were going to be entering into a consent and that by doing so that we were going to be in less better position, less a good position than we were at the beginning, but we did, as the demands escalated, our objections to them escalated as well.

Q Did you register those objections to your attorneys?

A At every single meeting.

Q Did your attorneys respond to those objections whe you did?

A Well, I'm going to relay this to Streit and

and Gould who are really our attorneys, meaning Fred's and mine. The format of every meeting, Mr. Frankel, was that they would tell us what the SEC wanted us to do in terms of the consent to settle this matter. We would have, I thought many times, have good objections to them. Gould would take a drag on his pipe and say, "We are here to save your lives. Now if you want me to represent you and I have gone this far in working out an agreement with the SEC, if you guys want to blow that agreement by not entering into this consent, that's fine, but if you go ahead with this, this will be the end of the matter. There will be no criminal reference. Now you do what you want."

Frequently that was the way the meeting ended and at every case we said, "Okay, Mr.Gould, we are here to follow your advice. We have hired you and we are going to do what you say", and we said the same thing to Mtreit.

Q Have you and Mr. Friedman, to your knowledge, fully complied with the terms of the consent judgment?

A Meticulously, in my opinion.

Q When did you first learn that the United States Attorney's office was investigating any matter in connection with TDA or any person connected with TDA?

MR. FRANKEL: NO further questions.

THE COURT: Mr. Naftalis?

EXAMINATION BY
MR. NAFTALIS:

Q Good morning, Mr.Fields. You have testified that you and Mr.Friedman retained Mr.Gould and his law firm to represent you in connection with the depositions with the SEC, is that correct?

A Yes, literally correct.

Q I'm sorry, I didn't hear you?

A I said literally correct. We had retained them earlier than that.

Q But in any event they represented you in connection with the depositions with the SEC about the consent decree, is that correct?

A Yes, sir.

Q I take it it is also fair to say that they had a third client as well, Mr.Davis, is that right?

A Absolutely.

Q Now you testified about a meeting in January or so after the District Attorney's investigation was concluded, with Mr.Gould, andothers,about what next steps should be taken, is that correct?

A I'm sorry, I don't -- I didn't catch the beginning of that.

Q Let me start it again. I think you testified--

A Irm getting tired. I heard what you said -- I just don't remember --

Q You testified in your direct examination that you had a meeting with Mr.Gould approximately January of 1975 in which he recommended that these facts be voluntarily disclosed to the SEC, is that correct?

A Yes, sir.

Q Just so it is perfectly clear, Mr.Davis was at that meeting as well?

A I believe he was, yes.

Q I think you testified to a number of other meetings throughout 1975 and I think you indicated on your direct examination that some Mr.Davis was at, to the best of your recollection, some he wasn't. Is it fair to say that to the best of your recollection that until around the fall of 1975 that you, Mr.Friedman and Mr.Davis, in your meetings with Judge Streit, and Mr.Gould, would have joint meetings, but from then on the meetings were separate, by and large?

A Yes, I think that's a fair statement.

Q In the latter part of '75,that is in the fall of '75 from say September, October, on, Mr.Davis would have his meetings with Judge Streit and Milton Gould separately, and you and Mr. Friedman would meet with Judge wtreit and Mr. Gould separately, is that correct?

A Yes,it is. Yes, sir.

Q Whereas in the earlier part of the year the three of you had met together with Messrs.Gould and Streit, is that correct?

A Right, we would generally see Mr. Davis going out as we were going in, or you know, in the latter part of '73 or the other way around.

Q I take it the three of you signed consent decrees at or about the same day?

A We signed it on the10th. He signed it on the 11th, to my knowledge.

Q And to your knowledge that was the same day he signed the letter of resignation pursuant to Rule 2E of his right to practice law before the SEC?

A To tell you the truth, I know he signed the letter on that day, because we saw Judge Streit, but I really think that the reason that Davis was meeting separately was because Fred and I were not privy to what was happening on the 2E situation, so whether that letter makes no -- I have never seen that letter. Whether it makes a reference to 2E or not, I don't know, but I know as part and parcel to avoid the whole criminal reference I know that Davis was obligated to -- well, Judge Streit told the SEC that Davis would resign for life from practice before the SEC.

Q That was one of the conditions that Mr.Davis was required to adhere to in order to obtain the commitment of no reference of his case for criminal prosecution, is that correct?

A Yes,sir. Best of my knowledge that is what we were told by Mr. Gould and Judge Streit.

Q You indicated that you -- and I think you indicated that Mr.Friedman were reluctant about some or many of the terms and conditions that the SEC was demanding in connection with the proposed settlement, is that correct?

A Yes, sir.

Q I take it it is fair to say that Mr.Davis had a large number of reservations, to your knowledge, about many of these same terms and conditions?

A Vehement, if not vituperous objections.

Q And he articulated them vehemently and vituperatively, to use your words, to your attorneys, Mr.Gould and Judge Streit, when they proposed them to him?

A Yes, he certainly did.

Q I take it that his adherence to the settlement based on your knowledge was of the same reluctant nature as yours?

A I'm sorry?

Q That is not a question. I withdraw the question. I take it when Mr. Davis raised his objections to various parts of the proposed settlement he was met with the same response by Judge Streit,and Mr.Gould as you were, that is, he was, the fact was pointed out that you shouldn't do anything which would disrupt the settlement and cost you the commitment of no criminal reference, is that right?

THE COURT: You must limit your answer to your own knowledge, of course, Mr.Fields. I gather that towards the end of it, the meetings were separate.

THE WITNESS: Yes, sir, in fact I was in meetings-- let me just say this. These -- these meetings, I relate them as antiseptically as possible, but I don't want you to get the impression that these meetings did not have an extreme emotional effect on various people, and I can tell you directly of my own knowledge of having been present in these meetings that the effect that this type of sanction on Mr.Davis was such that there were tears in his eyes and on his cheeks on many occasions.

MR. NAFTALIS: Thank you.

THE COURT: Mr.Wright.

MR. WRIGHT: Nothing, your Honor.

A Well, Gould told Moran that he was bringing over a matter to the Securities & Exchange Commission which in his opinion had certain securities' elements to it, and therefore -- and which might be of interest to the SEC, and that he was -- what he wanted to do -- and he would have Mr. Kantor with him. He said, "We want you to investigate these matters" -- and this is what he said to me that he told to Moran -- "investigate these matters and we will arrive at a mutually agreeable consent, sanctions, etc., ancillary relief, whatever, payments of monies" -- and that "In doing so we were doing this on a basis that we have resolved a number of other cases here, which would include that there would be no criminal reference of the matter, and that the sanctions imposed by the SEC should be fully dispositive of it without requiring a criminal reference."

He said that he would check with Washington to get the authority to do that, and that he would be so informed, and that it was his belief that the matter would stay in the New York office of the SEC, but if it didn't that it would, in his opinion, really be no different. In other words, if it were -- if the matter were taken up by the Washington Office, he had -- he could make the same kind of arrangement -- he felt that he could make specifically he said.

Q I take it, then, that your understanding from Mr. Gould was that Mr. Moran had made an evaluation at the January 14th meeting that a criminal reference would not be appropriate in this case -- to use a phrase that has been used here before, that there were no surprises.

A I don't want to go that far to say that, because Gould knew what he was talking about, and Gould made it quite clear to me, to Fred Friedman and to Herb Kantor that he was not going to give us every single detail of what he was doing, and under no circumstances would he do that, and if we asked him about every single detail and he was going to give us a blow-by-blow description of what he was doing, we were in the wrong room.

Q All right. I'm not asking you for a blow-by-blow description, Mr. Fields. I am asking you, was it your understanding from Mr. Gould that Mr. Moran had made an evaluation at the January 14th meeting and had concluded that a criminal reference would not be appropriate in this case, so long as there were no surprises?

A Could you give me the beginning of that question?

(Record read by the reporter.)

A I concluded from Mr. Gould that he had gone down there with a specific objective in mind, which he did not put in writing and in outline for me, and when he got back from that meeting that he was of the opinion that he had achieved what he had sought to achieve in that meeting.

Now how far you can go with that I have no idea.

Q Can you answer the question yes or no, Mr. Fields? Was it your understanding that Mr. Moran had made an evaluation at the January 14th meeting and had concluded that no criminal reference would be appropriate, so long as there were no surprises?

MR. FRANKEL: Your Honor, I object. First of all, the question has been asked several times.

THE COURT: Yes, but it hasn't been answered yet. This is a rather precise point.

MR. FRANKEL: It is also a misstatement of what Mr. Fields has testified to, because Mr. Fields also testified to the issue of working out a consent, and Mr. Fields certainly did not say that this was what was going to be done irrespective of whether they worked out a consent.

Mr. Cutner specifically omitted that from his question, so it is not a fair characterization of what Mr. Fields said.

the stand.

PETER S. DAVIS, called as a witness in his own behalf, being first duly sworn, testified as follows:

MR. NAFTALIS: May I inquire, your Honor?

THE COURT: Please.

DIRECT EXAMINATION

BY MR. NAFTALIS:

Q Mr. Davis, how old are you?

A Thirty-six.

Q And you live in New York City?

A Yes, I do.

Q Where were you born, sir?

A I was born in Providence, Rhode Island.

Q And did you grow up or go to school or college in Providence?

A Yes, I did.

Q And did there come a time when you went to a university?

A Yes, I did.

Q And where was that, sir?

A Tufts College.

Q Do you have any additional college studies beyond that?

A Columbia Law School.

Q And what was the year of your graduation from Columbia Law School?

A 1966.

Q And after you graduated from Columbia Law School did you practice law?

A Yes, I did.

Q And would you tell us with what firm and during what period of time you practiced law?

A From 1966 to 1969, with the firm of Willkie, Farr & Gallagher.

In 1969, I formed my own firm, the firm of Davis, O'Sullivan, Weil & Wolff.

Q And how long were you with Davis, O'Sullivan Weil & Wolff?

A From 1969 to 1975.

Q And in 1975, did you resign from yur firm, the Davis, O'Sullivan firm?

A Yes, in September of 1975.

Q And did that resignation occur at or about the time that you were entering consent decrees in this case?

A Yes, it did.

Q And have you practiced law with any law firm in active practice of law since your resignation from Davis, O'Sullivan, Weil & Wolff?

A No, I have not.

Q Mr. Davis, during the period that you practiced law did you have any area of specialization that you worked in?

A Yes, I did.

Q Will you please tell the Court what it was?

A It was the area of specialization in acquisitions and corporate securities finance.

Q Did much or any substantial percentage of your work involve practice before or dealings with the Securities & Exchange Commission?

A Yes, it did.

Q Was that a large percentage of your practice?

A A very large percentage of my practice.

Q Are you familiar with the company called TDA Industries?

A Yes, I am.

Q Were you ever an officer and director of TDA?

A No, I was not.

Q Did you ever serve as general counsel for TDA?

A Yes, I did.

Q I want to direct your attention to approximately March of 1974 or so. At that time did you become aware of an investigation being conducted by the New York County District Attorney's Office, which related to certain transactions involving TDA Industries?

A Yes, I did.

Q And in connection with that investigation did you retain an attorney?

A Yes, I retained Milton Gould of the Shea, Gould law firm.

Q And was he the same attorney that represented Mr. Fields and Mr. Friedman for the same purposes?

A Yes, he was.

Q Now I want to go to the end of 1974 and the beginning of 1975.

Did you learn from your attorney, Mr. Gould, that the New York County District Attorney's Office investigation had come to a conclusion?

A Yes, Mr. Gould informed us that he had been informed that the District Attorney's Office had concluded their investigation and had determined that under New York law they felt there were no actionable offenses.

THE COURT: I gather, Mr. Davis, that during this time we are talking about Mr. Gould was acting as your personal attorney?

THE WITNESS: Yes, he was, sir.

Q I want to direct your attention to approximately the early part of January 1975, after you learned from Mr. Gould about the conclusion of the New York County District Attorney's Office' investigation; did you have a meeting or conversation with Mr. Gould regarding what, if any, course of action should be done on your behalf or taken on your behalf by Mr. Gould?

A Yes, we did. We had a meeting in early January 1975, in which Mr. Gould proposed a course of action which involved approaching the Securities & Exchange Commission with the facts that had been before the District Attorney's office in New York County.

His strategy in that approach was that it was his feeling that a settlement could be worked out whereby on the one hand we, as potential party defendants, would have to agree to sign a consent; would probably have to agree to pay back certain sums of money to the corporation, and possibly with respect to myself I would be involved with some type of 2(e) proceeding.

On the other side, what we would be looking for was an assurance and an understanding that there would be no criminal reference in the matter.

He stated to us that he had been most successful in the past in this type of approach and in this type of arrangement, and was optimistic that he would be able to forge the same type of arrangement for us.

Q Did you authorize Mr. Gould as your personal attorney to have discussions with the Securities & Exchange Commission about possible settlement or disposition along the terms which you have outlined in your last answer?

A Yes, we did.

Q Now, I want to direct your attention to some time a little later, in January or so, of 1975, do you recall having any conversation or meeting with Mr. Gould in which he reported to you the results of his discussion with the Securities and Exchange Commission about this possible proposal he had raised with you at the earlier meeting?

A Yes, I had a discussion with Milton Gould after his meeting with the Securities & Exchange Commission.

Q Will you tell us about it, to the best of your recollection?

A To the best of my recollection Mr. Gould was extremely pleased with the way the meeting with the Securities & Exchange Commission went. He was very buoyant. It was the type of conversation that, in essence, he stated to me the framework that he had proposed to us as a means of proceeding with the Securities & Exchange Commission had found acceptance with the Securities & Exchange Commission. He was very pleased, and because he was pleased I obviously was very pleased.

MR. CUTNER: Your Honor, I wonder whether we could have the conversation rather than about being pleased.

THE COURT: I think it is preferable, Mr. Davis, if you can recall as best you can today exactly what was said.

THE WITNESS: Mr. Gould is not one who gives a great deal of detail in his conversations with his clients. It is extremely difficult to interrogate Mr. Gould on specific conversations that he had.

The essence of the conversation that I got from Mr. Gould was that the approach that he had outlined to us in the meeting that we authorize him to proceed with the Securities & Exchange Commission, that format, that approach had found acceptance with the Securities & Exchange Commission.

MR. CUTNER: Your Honor, I press my objection. I think the witness should be asked to state as best he can what was said.

MR. NAFTALIS: Your Honor, I think he has answered the question. He certainly has given the substance of what Mr. Gould said.

I have a couple of more questions along this line which may obviate the need for Mr. Cutner jumping up.

THE COURT: All right. Put them, then. But I do think it is not particularly helpful to me to be told, although it may well be true, that it is difficult to interrogate Mr. Gould.

What I need from you, Mr. Davis, is your best recollection of what was actually said. Do you see what I mean?

THE WITNESS: Yes.

THE COURT: Go ahead, Mr. Naftalis, we will see if it clears up. If not, we will try again.

(Continued on next page.)

Q What did Mr. Gould tell you either in exact words, if you can recall it, or the substance, if you can't recall the exact words, about his meeting with the SEC and in particular, if there was any conversation between yourself and Mr. Gould about the subject of any commitment or possible commitment from the SEC regarding no criminal reference or prosecution in this case?

A Mr. Gould stated in essence that the proposal whereby we on the one hand would have to sign a consent, would have to be involved in some type of monetary payment to the TDA and, on the other hand, a commitment that the Securities and Exchange Commission would not make a criminal reference, had found acceptance with the Securities and Exchange Commission.

Q Do you recall any other conversation at that time?

A Not at that time.

Q Mr. Davis, during the course of 1975, did it come to your attention from your counsel that negotiations were being held between him and representatives of the Securities and Exchange Commission as to the terms, the precise terms of any settlement that would occur?

A Yes, it did.

Q To the best of your recollection, did you have a number of meetings or telephone conversation with Mr. Gould and his partner Judge Streit on the subject?

A Yes, I did.

Q Did they relate to you, at least to the best of your recollection, demands and terms that the SEC was asking you in connection with this proposed settlement?

A Yes, they did.

Q To the best of your recollection, and I want to direct your attention to the late summer, early fall period of 1975, what terms and conditions were you being told about by your attorneys, Judge Streit and Mr. Gould that the SEC wanted included in this settlement?

A The terms involved a payment of a sum of money. It involved disciplinary action against me as an attorney before the Commission and it involved a consent, signing of a consent decree.

The terms over this period of time seemed to escalate from monetary payments in the view of Mr. Gould of approximately $250,000 that he thought would be a sum, an outside sum, to a sum of much larger amounts. They also escalated with respect to the nature of the disciplinary action, vis-a-vis me.

Q When you say they escalated as to the nature of the disciplinary action as to you, what was your understanding based on your conversations with your attorneys in that regard as to what it was originally and what it escalated to?

A There was no question in the beginning Mr. Gould had informed me that in his mind, a part of an overall settlement on this matter, if we were to obtain an agreement that we viewed as a cornerstone of the settlement, that I was going to be subject to some type of disciplinary action.

Initially it was thought by Mr. Gould that a suspension of some type of duration would be the type of relief that he would be able to obtain. As we got further along into 1975, that belief was not substantiated.

Q During the course of these conversations that you had with Mr. Gould and/or Judge Streit -- I take it you met with both of them together and separately during the course of the year?

A Yes, that is correct.

Q There were periods during the course of the year that Mr. Gould was physically hospitalized?

A At that time I met with Judge Streit and through the latter part of '75 up to the signing of the consent, I met much more with Judge Streit than with Mr.Gould.

Q As you were informed by Judge Streit and Mr.

Gould as to the increasing nature of the demands being asked by the SEC as part of the settlement, what was your response to them in these meetings?

A My response to them was that I was most reluctant to sign a consent of this nature. In fact, in many meetings, I indicated I would not sign the consent.

Q What was their response to you when you told them you wouldn't sign the consent?

A Judge Streit and Mr.Gould viewed me as a most difficult client on this matter. Their view was that I shouldn't be arguing about monetary matters and matters concerning my 2E, when they had a commitment on no criminal reference. Their view, in essence -- not in essence -- specifically, if I wanted to pick up the pieces of my life, I better damn well agree on what they had reached agreement on.

Q I think you mentioned some reservations you had about the consent decree in terms of the monetary amounts, is that correct?

A That is correct.

Q And you indicated you had discussions about that with Judge Streit and Mr. Gould, which I think you related, is that correct?

A That is correct.

Q I think you indicated -- well, I take it you also had reservations about the demands for a lifetime resignation on your part or a lifetime bar on your part from the practice of law before the Securities and Exchange Commission?

A I had extreme reservations. I built up my own practice on the basis of an acquisition practice and securities practice. Even an acquisition field, you deal in securities matters and in essence, it destroyed my practice and forced my resignation from my law firm.

Q Did you have any other reservations about the proposed terms of the consent that you conveyed to either Judge Streit and/or Mr. Gould?

A Yes, I did. There were a number of other reservations that I had regarding the consent. I viewed the monetary payment to be one that, as a matter of law, was one that was not supportable by a payment to the TDA Industries. I felt there was a distinct possibility there would be a stockholders suit by the sellers of the shares in question that might result in having to pay a double amount, in essence having to pay the same sum twice for the transaction.

I raised with Mr.Gould the possibility of making the payments over to TDA Industries -- making the payments over in essence as a stakeholder situation for a court of competent jurisdiction to decide who has the right to these sums of money.

This was brought to a head by the fact in the fall of 1975 there was a civil action instituted by some of the sellers of the shares of stock demanding certain sums of money.

Q Was that the so-called Schultz Management suit?

A Yes.

THE COURT: Did that relate to ERD stock?

THE WITNESS: Yes, it was in the same transaction.

MR. NAFTALIS: Your Honor, that was an action brought in this court and was assigned to Judge Pollack and was settled by the parties.

A It was my feeling there was a potentiality of not only paying a huge sum of money to TDA pursuant to a settlement withthe SEC, but also having to pay that same sum of money in a matter brought by this particular group of stockholders.

I brought that matter to Mr.Gould's attention with a suggestion that he negotiate with the Securities and Exchange Commission to have included in the consent the fact that the payments over would be in essence stakeholder -- put in a stakeholder position.

Mr. Gould's reply to me was that I shouldn't mess with a settlement. I should leave things as they were. We had a commitment, I should not make any attempt to modify the basic substantive terms of that commitment.

Q When you say you had a commitment during this conversation or other conversations, did Mr. Gould or Judge Streit or both of them state to you what was the commitment?

A On numerous occasions.

Q What did they state to you?

A They stated they had a commitment, an agreement, an understanding there would be no criminal reference of this matter assuming a satisfactory consent was signed and assuming that a satisfactory, satisfactory to the SEC, disciplinary proceeding, was agreed to with respect to myself.

Q You say they told you this on numerous occasions?

A That is correct.

Q I want to ask you a question and want you to answer this. Did Mr.Gould and Judge Streit say to you they had a commitment agreement from the SEC there would be no criminal reference or did they merely say they had a hope or a belief the SEC would not refer it?

A They told me unequivocally they had an agreement, a commitment, an understanding.

Q There came a time in the early part of December where you formally signed a consent decree?

A That is correct.

Q At or about the same time, you signed what is in evidence as Davis Exhibit B, which is your letter of resignation from practice before the SEC for life, is that correct?

A That is correct.

Q Pursuant to the settlement th[illegible] was reached with the SEC, I take it you gave up your right to contest the allegations of the lawsuit, is that right?

A That is correct.

Q Obviously as the result, you gave up the right to appeal any adverse decision that would have been rendered in the District Court to the Second Circuit?

A That is true.

Q As part of the settlement that you reached with the SEC, you became liable along with Mr.Fields and Mr.Friedman to pay some $435,000 to TDA Industries, is that correct?

A That is correct.

Q In addition, you consented to injunctive relief against yourself under the securities laws, is that correct?

A That is correct.

Q In addition, you resigned for life from the practice of law before the SEC, is that correct?

A That is correct.

Q In exchange for all those things, Mr. Davis, other than the promise that you were told by your lawyers that the SEC had given that there would be no criminal reference, what if anything did you receive from the settlement?

A Nothing, Mr.Naftalis. That was the only thing that I received out of the entire settlement.

Q Mr.Davis, without the promise that you believe existed that your lawyers stated unequivocally to you existed from the SEC that there would be no criminal reference, would you have signed the consent decree and gone along with the settlement?

A No.

Q Mr. Davis, I want to direct your attention to approximately May of 1976. Did there come a time then in May of 1976 when you learned from your present counsel that the U.S.Attorney's office had informed him there was a grand jury investigation of which you were a target, is that correct?

A Yes, it is.

Q Some time in May?

A Early May, 1976.

Q Without going into that conversation, after you had that conversation, what did you do?

A I called Judge Streit to inform him of my conversation with you, Mr. Naftalis.

Q Can you tell us to the best of your recollection, what your conversation was with Judge Streit in May of 1976 on this subject?

A I informed Judge Streit of our conversation and Judge Streit's first statement to me was, and I remember it very clearly, "I don't believe it, we had a proposal."

I don't mean to characterize his reaction, but he was totally shocked by my conversation with him.

MR. NAFTALIS: Nothing further.

THE COURT: Are there questions from any other defendant?

Mr.Cutner.

CROSS-EXAMINATION

BY MR. CUTNER:

Q Mr.Davis, I believe you testified that over the year 1975 the demands that the SEC appeared to be making were escalating; is that your testimony?

A Yes, it is.

Q Wouldn't it be correct to say, rather, that the SEC demands turned out to be greater than what Mr. Gould told you they would be?

A I believe when I talked about the demands of the SEC escalating, I was talking about the monetary aspects of the situation and the 2E aspects of the situation.

I believe with respect to the monetary aspects, in the summer and early on into the fall, that Mr. Gould believed that he could settle the monetary aspects on the outside number of $250,000.

At a subsequent pointin time, Mr. Gould and Judge Streit indicated that the total monetary aspects would be significantly higher than that.

With respect to the 2E proceeding, initially I was of the hope that it would be able to be settled with a suspension of some duration. As Mr. Gould got further into the negotiations on that particular point, it became apparent that that was not going to be the case.

Maybe escalation was a wrong word to use on my part.

Q Let me ask my question again then: Isn't it true that the demands turned out to be greater than what Mr. Gould believed they would be?

A The demands with respect to the monetary aspects and the 2E eventually did turn out to be greater than originally had been hoped, yes, that is correct.

Q What Iam getting at is, would you concede that the SEC did not escalate their demand, but rather it was a question of the demands turning out to be greater than what Mr.Gould told you they would be?

MR. NAFTALIS: Objection. I think he answered that question in the affirmative. It seems to me to be a repetition.

THE COURT: I understand the witness' answer to be to that effect, but I will permit it.

A I can only relate what my counsel has stated to me, Mr. Cutner. I had no direct dealings with the SEC.

THE COURT: Did counsel ever advise you that the SEC had expressed a willingness to accept $250,000?

THE WITNESS: No, he did not, your Honor.

Q Let me turn back to the January 14, 1975 meeting, and I take it, Mr. Davis, you are able to distinguish in your own mind between an expression of hope that a proposal or belief that a proposal would be accepted as opposed to a statement that a proposal was in fact accepted or agreed to?

A Yes, I would hope that I could make the

THE WITNESS: If I were asked it was through my counsel, Milton Gould -- not directly -- and I am not aware now.

THE COURT: You have no recollection of such a request.

THE WITNESS: No.

THE COURT: You have not practiced law since 1975?

THE WITNESS: That is correct.

THE COURT: What are you doing now?

THE WITNESS: I am concentrating on this matter, sir.

THE COURT: Are you regularly employed in any manner?

THE WITNESS: No, I am not.

THE COURT: That is all.

MR. CUTNER: Your Honor, may I ask a further question in light of your Honor's questions?

THE COURT: Yes.

BY MR. CUTNER:

Q Mr. Davis, were you aware that your counsel, Mr. Gould, advised the SEC that you would assert the Fifth Amendment in answer to any questions put to you?

A I am not sure of my recollection on that. I do not have a recollection on that, Mr. Cutner.

MR. CUTNER: That is all.

THE COURT: All right, thank you, Mr. Davis.

(Witness excused.)

MR. WRIGHT: Your Honor, could we have five minutes, please?

THE COURT: Yes, by all means. We will take a recess.

(A short recess was taken.)

MR. NAFTALIS: Your Honor, before Mr. Ostrow proceeds, May I recall Mr. Davis just for one question?

THE COURT: Yes.

PETER S. DAVIS, recalled.

REDIRECT EXAMINATION

xxx BY MR. NAFTALIS:

Q Mr. Davis, at the closing question you were asked by his Honor whether or not after your resignation from the practice of law before the SEC in September 1975 you were engaged in any practice of law thereafter, and you answered "No." Is there anything you want to add to that?

A Yes. There was one matter that I handled in early 1976 for an old client, and that would be a caveat to that. I wanted to make sure that my answer was totally accurate.

Q Other than that matter for that old client have you engaged in the practice of law for any other client or with any other law office?

A No, I have not.

MR. NAFTALIS: I have nothing further.

THE COURT: All right.

(Witness excused.)

MR. FRANKEL: Your Honor, before the next witness is called, may I address myself to a pending motion which is related to this? I know that your Honor is going to defer ruling on all the other motions but this may be an appropriate time to indicate a motion related to this, which is our motion under Rule 6(e) for disclosure of whether or not any of the consents or any testimony relating to the consents or consent judgments were introduced in evidence before the Grand Jury.

I mention it now only because I was reminded by the colloquy between your Honor, Mr. Naftalis and Mr. Cutner earlier -- your Honor knows our position that there is no prejudice required at all to hold the Government to its promise. We show prejudice nevertheless, and we show prejudice in the criminal matter nevertheless; but in addition to that, which we have shown, we would also like to know

Q Have you also had experience in SEC enforcement cases?

A Yes.

Q Do you presently represent Alan Sandberg?

A Yes, I do.

Q When were you retained?

A About November or December of 1974, and I do not have the precise date at hand. I was called by Herb Kantor and advised that he thought had had a conflict and could not represent Alan Sandberg in an investigation then going on at the office of the District Attorney of New York County.

Q Were you aware that other people were the subject of that investigation?

A I was aware there was an investigation going on in the District Attorney's office into the company TDA and into what some people who were associated with that company were alleged to have done.

Q Who were those people?

A Mr. Fields, Mr. Friedman, Mr. Davis, Mr. Schoenbrun, Mr. Sandberg and others.

Q Were you aware at that time whether these people were represented by counsel, namely, Mr. Fields, Mr. Friedman and Mr. Davis?

know, sometimes it takes a day or two to get Milton Gould.

Q Did Mr. Kantor convey to you what had transpired at the meeting between Mr. Gould and the Securities & Exchange Commission?

A Yes. I would have to say that the substance of what Kantor conveyed to me sometime in '75 early on, was that Gould had gone down with Kantor -- perhaps with Judge Streit, and that they had made an effort --

Q Do you recall when he had gone? Do you recall the date?

A I looked at my diary entries from Miller & Summit, because I had been with three firms in the last two years, even though I once considered myself stable in that regard.

I did not get a chance to see my diary entries from Rogers & Wells.

I cannot fix the precise date. It was early '75 that Kantor told me in substance that Gold had gone down and had proposed a package, as it were, to the Securities & Exchange Commission; and that package being no criminal reference, a restitution, or as the SEC liked to call it, a disgorgement of giving back in some place that which someone says people shouldn't have taken in the first place; a reconstitution, as I recall it, of the board or of the officers, and that that last one was not of great concern to me because Sandberg was not then a director of the company -- and of course a consent judgment to settle the SEC civil action.

I think those were the basics of the package that I understood had been proposed to the SEC.

Q Did he relate to you who said what to whom during that meeting?

A No. I can't say that I heard from Kantor or Gould -- and I think it was Kantor who said what -- it was my judgment that I should kind of remain back. I viewed Sandberg as -- well, with due deference to the main defendants, if I may call them that -- something less than that. He had been involved in this one transaction.

He was not on the board. He was not an officer.

It had been my judgment, and still is, that the SEC was not going to settle with me alone probably unless and until they try to work out something with the other defendants, and then I either could then go along or not go along with the main settlement.

Q And for that reason you did not attend this particular meeting, is that correct?

A I was not invited. That's the main reason I not attend. It was my judgment that I should not go at that point.

Again, with apologies to the other great lawyers in America, my judgment was that if Milton Gould could not sell the package that had been suggested, I did not think that anybody could, as much as I think about my ability to be persuasive.

Q Did you subsequently relate this to your client, Mr. Sandberg, do you recall?

A Yes. I think he knew from me and from the people at the company the general status of what was going on. He would call from time to time. He once brought in some records to me. I kept him advised, and I believe he was also kept advised by Mr. Fields, among others.

Q Between this time, the early part of 1975 and September 1975, do you recall having any further conversations with Mr. Gould or Mr. Kantor with respect to the progress of their discussions with the SEC?

A You said when?

(Question read by the reporter.)

A There were conversations but I must say it was not until September 1975 at a meeting at Mr. Gould's office -- September 22, my diary entry shows and I assume that is right -- that I was advised that with some details to be finalized -- and by "details" I mean I recall that the down payment changed of the amount that was to be disgorged; whether or not or how long Fields and Friedman should remain as what, and in what capacity -- that seemed to change, but I was informed that generally if those things could be worked out that it was Gould's view, which he expressed, that the case would not go criminal, that an amount would be paid to the SEC in the nature of disgorgement. And from Sandberg's point of view it was that he as a tag-along was to disgorge some shares of stock he had purchased from the company, which had been alleged and continues to be alleged that he used the proceeds of his finder's fee that he shouldn't have gotten, to buy the shares of stock in the company; that he was to give this back to the company, sign a consent decree and the other things that I mentioned.

Q During this period did you feel it at all incumbent upon you to double check or check with the Securities & Exchange Commission as to the accuracy of the proposal that you had discussed with Mr. Gould?

MR. CUTNER: I object to that, your Honor.

THE COURT: No, I will take it.

A Well, I must say I don't recall now the date the complaint was filed by the SEC but --

Q I believe it is September 16.

A There is no question that I had been at the SEC between the date I first heard from Kantor and September -- I had been there with Mr. Sandberg when Mr. Perlmutter insisted that he be questioned --

Q What was the outcome of that, by the way? Did he testify?

A Yes, he testified but he asserted his constitutional right not to testify.

As I recall, I was surprised when I heard something about letters -- I don't recall that Mr. Perlmutter was willing to take a letter from me. I recall that he wanted Sandberg under oath to take the Fifth Amendment.

I said I did not think it was necessary, so we went through the taking of the Fifth Amendment in, I believe, March of 1975 -- Sandberg testified about his name and address and took the Fifth Amendment on any substantive question.

So I had had contact. I knew from Perlmutter sometime later that they were going to file a complaint, and then I remember there was a big brouhaha about whether or not Perlmutter had in some way breached an understanding that he had with Gould that the complaint should be filed and everything should be settled on the same day, because one of the traditions of the Securities Bar is the so-called one-publicity shot -- that is, if you can settle the case the same day that the SEC brings it, at the bottom of the page in the Wall Street Journal it says "and defendants also settled the case."

So if you can try to accomplish that in one day, it has always been felt you are better off.

So there was a disagreement, as I recall, that in fact that agreement to notify sufficiently so that everybody could settle, had been breached.

So there is no question that I had communications mostly with Mr. Perlmutter at the SEC during the period January through September, when I finally heard from Mr. Gould about the nature of the proposal that he said the SEC had agreed to.

Q Did you subsequently meet with members of the Securities & Exchange Commission in connection with this matter?

A Yes, and my recollection is that it was just once.

I had numerous telephone conversations with Mr. Perlmutter, and perhaps others, but there was one conference meeting. I recall it was the end of October. I recall -- well, part of the meeting Mr. Streit and Mr. Kantor were present -- I think Streit left, and I also recall that I was alone with some of the staff people for a period of time.

I must say, Mr. Wright, that meeting was not only from the SEC's point of view to settle the case but I was giving a final shot as it were, in attempting to have them dismiss Sandberg out.

My argument was that this was not a disclosure case insofar as Sandberg was concerned; that whatever duty the company had, whatever duty it had, and whatever duty the officers had, if they had any duty at all, was to disclose that Sandberg had in fact received money that he shouldn't have received for whatever reason was alleged, that he had no obligation to disclose -- that that was a company or officers' problem. He was not in the company.

MR. BENDER: Your Honor, might I at this time -- I do not know if Mr. Ostrow is aware of the fact that we are not going into the merits on this, and the proposition that we had suggested to the Court earlier with respect to it, and I wonder in view of that if he was advised about that, if he would care to go into the question of the merits, because I think he is going into it.

THE WITNESS: Your Honor, I apologize for that. I understand that general ruling, but I just want to put into context before your Honor the reason for my -- the reason for my, at that late date, attempting to dissuade the

SEC staff now having sued Sandberg from going forward with their case.

THE COURT: Well, I am sure you appreciate that we are trying to focus in this proceeding on the understanding that people had, the operations of people's minds --

THE WITNESS: Yes.

THE COURT: -- insofar as it is related to those understandings, so I want to keep references to the underlying merits to a minimum.

THE WITNESS: I am finished with that, your Honor.

Q To sum it up, it was your intention at that meeting to attempt to convince the members of the staff not to continue with the civil case against Mr. Sandberg, is that correct?

A That is right. I think I argued to them, "Look, you are getting disgorgement in a substantial amount. Perhaps you should be satisfied with Sandberg giving back his stock and something less than a consent judgment and undertaking maybe nothing at all" -- and we had that conversation for a period of time.

Q Can you tell us who at the SEC was present again?

A Yes. I think Mr. Perlmutter, Mr. Tucker -- is it Mr. Pernick -- right? Pernick I think may be right. Certainly Tucker and Perlmutter.

And -- oh, I argued all sorts of things, but the bottom line was whenever I sat in another case, why it should or should not happen, to say that this case is different, and I finally said, "I think -- well, I suppose settling this civil case is better than looking across the street from Tucker's office, better than going over to the Golden Dome."

Q Can you explain what that allusion was to?

A Yes. Mr. Cutner said to me before informally that it is not really a dome, and he is right. It is not a dome on the top of this building, it is more like a triangle, and that is why I became a lawyer -- I was never very good at shapes -- geometrical shapes.

But it certainly is gold-looking, and, you know, and my reference was, without saying it, "You guys beat me into the ground. I will let Sandberg sign this consent. It sure beats getting indicted."

Q Did anyone present at that time respond?

A Yes. I think they chuckled. Certainly no one said, "Norman, you don't know what you are talking about," or "This case has got to be a reference," or "This is going to wind up criminal."

Now I must add to that, Mr. Wright, I don't know if you are going to ask me -- I didn't hear until last week that on December 1st those same people were sitting in the room with me or one of them was in this building with the golden -- now triangle -- discussing bringing the case here. And the reason I mention that is: Did they have it on their minds that day when they spoke to me at the end of October? Do I think they should have told me before we finally signed the consent decree in January?

Well, the answer to those questions that I put to myself is "Yes".

Q Is it fair to say, then, that when you left that meeting you had no doubt that the SEC had agreed not to refer the case criminally as a result of your decision to advise your client to sign the consent decree? Is that correct?

A My answer is, from what I had heard from Gould and Streit and Kantor, but mostly Gould, for a lot of reasons, some of which I have already mentioned -- because of what I discussed in that room, because of what the SEC was getting, and for all those reasons it was, yes, in my mind when I advised Alan Sandberg to sign the consent decree, that this was the best way out, and at least it would avoid the SEC doing something about his getting indicted.

Q So you subsequently discussed your discussions with Mr. Sandberg.

A. Yes.

Q Did he express any reluctance to signing the consent decree?

A He had been reluctant -- clients often are reluctant to do anything, and he was being asked to give back some stock that he had bought.

He was asked to sign a consent decree.

I explained what that meant to him. I think it was on his mind when he asked me "Is this going to be the end of it?"

And I said, "From what I have been told by Gould I believe this is going to be the end of it."

Q Did he subsequently sign such a consent decree?

A Yes, he did.

Q I show you Defendant's Exhibit L for identification, and I ask you whether that is a copy of a letter from Mr. Perlmutter to you, which encloses a copy of the consent decree and judgment which was filed against Mr. Sandberg (handing).

A Yes, it is.

MR. WRIGHT: I offer it in evidence (handing).

MR. CUTNER: No objection, your Honor.

THE COURT: Received.

(Marked Defendant Sandberg Exhibit L in evidence.)

xxx

Q This is a three-paragraph letter, and I am going to read to you, Mr. Ostrow, the second paragraph -- this is Mr. Perlmutter to you:

> "In order for this matter to be properly concluded as against your client, it is essential that a properly executed original and copy of the affidavit of acknowledgment be returned to us at your earliest convenience."

Did you know at that time when you received this letter that some six weeks prior to that time someone at the Securities & Exchange Commission had referred this case to the United States Attorney for criminal prosecution?

A I certainly did not.

THE COURT: What is the date of the letter?

MR. WRIGHT: The letter is dated January 20, 1976.

Q At this time were you of the belief that the Securities & Exchange Commission had an understanding with all of the defendants and their counsel that if they agreed

Q Mr. Ostrow, is it your testimony that you had an agreement with the SEC to the effect that there would be no criminal reference as to your client, Mr.Sandberg?

A Yes, I would have to answer that yes.

Q That is something more than a belief that the matter would not be referred, is that correct?

A Yes.

Q You came to an agreement, an understanding with someone at theSEC that there would be no reference with regard to Mr.Sandberg?

A No, that is a different question.

Q Can you answer that question?

A Did I personally ever come to that agreement with someone at the SEC. I think my answer is no, I did not. Was there an agreement I was included in and my client, I believe there was.

Q You say you believed there was?

A Or "yes".

Q Who at the SEC expressed to you there was an agreement in which your client was included?

A No one.

Q No one?

A No person at the SEC expressed to me, whatever your question was.

Q I take it your understanding that there was an agreement came from Mr. Gould, is that correct?

A Mr.Gould and Kantor and Streit, yes, and, I don't know whether you call this hope or not, Mr. Cutner, but if someone at the SEC was over in this building, I felt, and I feel,and I will continue to feel, they had an obligation to tell me that before my client signed a consent decree.

Q All right. I think that is really the issue in this hearing as something the Judge has to decide.

A I apologize for that, but I don't think you can segregate out Gould and not include all those other things, and those were not hope things, those were lawyers dealing with lawyers in important matters.

Q What I am trying to get at, Mr.Ostrow, is your personal knowledge of any agreement with the SEC concerning your client, and I take it from your testimony, nothing was expressed to you from anyone at the SEC on that subject?

A Nothing was expressed directly in form that you put it, yes.

Q Nor did you at any time ask anyone at the SEC if such agreement existed as to your client?

A No, I did not, and if you like, I can explain

Enforcement attorneys in Washington as well as the Enforcement attorneys in the nine regional offices?

#2 A Well, I am in charge of the enforcement policy and program.

The attorneys in the regional offices operate under a Regional Administrator, who in addition to enforcement jurisdiction, also oversees other programs on the Commission. But with respect to the policy, the enforcement policy and programs, I am in charge of that.

Q Can you tell us whether there is a chain of command in the SEC, if that is a fair term to use?

A There is, yes.

Q Can you describe that for the Court?

A Well, the Commission is run by five persons -- four Commissioners and a Chairman, all appointed by the President of the United States, subject to Senate confirmation.

They are appointed for five-year terms on a staggered basis. Each year there is a new vacancy.

Under the Commissioners there is an Executive Director who has the operational responsibility for the SEC, in addition to which there are a number of other directors all reporting to the Chairman of the Commission, who have responsibility for substantive operations of the Commission.

Those divisions, among others, would include the Division of Enforcement; it would include the Division of Market Regulations, which deals with regulation of the securities markets; the Division of Corporate Finance, which deals with the issuance of new securities; the Division of Investment Management, which deals with mutual funds of investment companies and the like.

Q I wonder if you could continue that and work your way down through the chain of command right to the staff attorney level.

A In the Division itself you have the Director.

There are three associate directors. Under each of the associate directors in Washington there are two assistant directors.

Under the assistant directors, each has two branches, and under the branches are the line attorneys or line investigators or line accountants.

In the regional officers what you normally have -- and this can vary from region to region but generally what you have is a Regional Administrator, as in New York here, two associate regional administrators, one for enforcement and one for regulation.

Under the Associate Regional Administrator for enforcement here, say, in New York, you have two assistant Regional Administrators, and under him you have branch chiefs, and again line attorneys, accountants and investigators.

Q Under the set up at the Securities & Exchange Commission, is a staff attorney able to make a recommendation to the Commissioners in Washington? And, if so, how is it done?

A Well, a staff attorney has responsibility for -- in charge of a specific enforcement project or case.

He will do an investigation. He will, on authority from the Commission, he will issue subpoenas.

He will take testimony. He will then analyze the case and, in effect, write a report of that investigation, which then becomes a recommendation. That recommendation would then go up the chain of command.

Q So that staff attorney's report would be reviewed by his branch chief?

A That is correct.

Q And then by the Assistant Regional Administrator?

A That is correct.

Q The Associate Regional Administrator, if there is one?

A Not necessarily. For example, in my -- in the case gets brought in a particular community, the U. S. Attorney says "Hey, I think I have an interest in this matter." An office call will be made in which he will say "We would like to have that case referred to us," and then it gets referred without this elaborate kind of procedure.

Q Statutory procedure?

A It is not statutory procedure.

Q The regulatory procedure?

A It is only one kind of procedure.

Q No. I said the thing that you said was elaborate is in the statute or in the regulation.

A It is a procedure that says that the Commission may refer cases. That means that the Commission on its own may ask the Department to prosecute the case, but there is nothing that precludes a U. S. Attorney, who has evidence of a crime to say "Hey, SEC, you have not referred this matter to us. Will you send me your files on this matter."

That is done every day of the week, your Honor.

THE COURT: In describing that alternative matter in which a criminal reference can be made, you are assuming, of course, that somehow or other the United States Attorney's Office finds out about the case?

THE WITNESS: Yes, and it can be found out either by reading the newspaper or can be found out as -- I believe either discussing with me or discussing with Mr. Moran or somebody else -- and the reason there has been so much work that has been generated in the past year is that these matters are becoming matters of public interest, and I assume the good, aggressive U. S. Attorneys' offices are doing their job.

Q Mr. Sporkin, as good and aggressive as certainly this U. S. Attorney in this District is, and as good and aggressive as I am sure Mr. Cutner is, they did not find this case out in the newspapers, did they?

A As I recall from the discussion the other day --

Q Did they, Mr. Sporkin?

THE COURT: Let him finish, please.

A I don't know whether they did. I assume that somebody discussed the matter.

Q You mean somebody on the staff of the SEC told them about it and that is how they became enlightened, isn't that so?

A I understand there was a discussion between somebody on the staff, and I think it was Mr. Wing -- Mr. Sorkin, I believe.

Q Mr. Sporkin, I said this before and I'm going to say it again, none of my questions are intended to be another case, in which there was some slip-up, Mr. Sporkin, that caused you to recirculate your policy once again?

A I just don't know why I did it. It might have been this case, but I don't know the reason.

MR. OSTROW: I have nothing further.

BY THE COURT:

Q Mr. Sporkin, I have found your testimony in this case very interesting, indeed. I am grateful to you in coming back a second day. As I am sure you will appreciate, there are serious issues involved and I felt five o'clock on Thursday it simply would not be fair to the parties or to counsel to try to complete cross-examination on that day.

There are one or two questions where you can help me further, I think, and I am going to ask you to do that by responding to hypothetical questions, at least they take the hypothetical form.

Here is the first one. If anything seems to you unclear about this question or if you feel any of the component parts should be discarded or retooled, let me know.

Assume, if you will, in 1975 a staff member of the SEC's New York regional office receives a visit from an attorney for private individuals. That attorney says to the SEC staff attorney in substance, "My clients may have committed violations of the securities laws. I intend with their authority to make full disclosure of the facts to you. It is both my hope and my objective that after such disclosure has been made, it will be possible to negotiate a consent judgment in a civil case and that there will be no criminal reference."

Now, according to SEC policy and practice as it existed in 1975, is there any particular response that the SEC staff attorney should have made to that particular statement?

A Your Honor, the only thing I can tell you is what I would have done if that will be helpful.

Q Yes.

A What I would have said to the person would have been very simply that I think he is proceeding along the proper line, that he had to understand our policy concerning that you can't bargain away a criminal case on the basis of a civil action. Depending upon whether that person was familiar with the SEC or not, that I might tell him or he would at least realize, he could make his own judgment. He is on his own, that is why people pay lawyers, whether he thinks that would be a consideration or not, but one thing would be emphatic would be the point there would be no understanding, written or any other thing.

I think the letter came into evidence today exemplifies what happened where apparently something like that was said and the lawyer got a little bit edgy and he said, I am going to put this in writing, this is what I told you.

That is another thing that could have been done in that type of case.

Q But your response to my question is, that had you been in the position of the assumed SEC staff attorney, you would have made a particular point in response to that particular statement that there could be no consideration of a waiving or an abandoning of the criminal reference?

A There would be no understanding.

I would make it quite clear that his giving advice to his client based upon his best judgment -- you know, many attorney's understanding what my policy is, will nevertheless, I am told, advise clients, Look, your chances are lessened in this case.. We can't promise you, but your chances are lessened if you do all these things. That is the advice between the attorney and the client. Nothing is based upon any understanding, even indirect communication that that will happen. That is so contrary to our policy, and I have mentioned that, because we just can't be faced with those kinds of charges and secondly, we really don't have the authority.

The attorney has to know he might be buying a pig in a poke, because even if he did, and remember most cases -- I don't know about this case -- you have bargaining power. You have some young attorney, a year or two out of school, with an experienced person on the other side where a large amount of money is involved. That young attorney just doesn't have the authority just like in a settlement case. Certain people just don't have the authority to be able to do those kinds of things.

Q Does it follow, then, that if the SEC staff attorney failed to make the response to such a statement, that SEC staff attorney would be departing from the policy which you have sought to lay down?

A If it's as clear -- you have to distinguish between someone saying that is my hope versus -- that is my hope of what I am doing, which while I might do it, I don't know that you have to say every lawyer has to do it -- versus another point where he says, it's in consideration of my going through that I spect, or I understand there will be no criminal action,and I think there is a line there that can be drawn.

There I think the staff member should tell that person. If he doesn't tell him what the consequences are, that you will have to decide, but I do feel there is a distinction where somebody might come in and say look, one of the reasons I am doing this thing is to avoid further action. I hope I can clean this mess up and you will look kindly upon our people.

Q Let me put another situation to you.

Assume an attorney representing private individuals makes the sort of statement to an SEC staff attorney that you referred to in my prior question and assume further, Mr. Sporkin, that as the result of that statement, the SEC staff attorney is aware it is a primary objective of counsel for the private individuals, that there be no criminal reference, and assume that contrary to your own policy, as I understand it, theSEC attorney makes no particular response to that of the sort you described to me, and assume further that negotiations then take place between the SEC's staff and the attorneys for the private individuals.

Assume that a number of factors are negotiated within the context of a civil case and a consent judgment, factors such as how much restitution is to be made, whether individuals can continue as officers or directors of the corporation; whether or not one individual who is an attorney is to be barred from practice before the SEC for the rest of his life;

Assume further, as I have said, that at the commencement of and during the course of these negotiations, the SEC staff attorney was made aware of the private individuals' strong desire to avoid a criminal reference, and assume further that a civil action having been begun, the terms of consent judgments are substantially negotiated;

Assume further that prior to the execution of any of the consent judgments and indeed, while certain terms are still being negotiated, the SEC staff attorney advises the United States Attorney of the matter and causes his file to be made available to the United States Attorney who has in turn begun a study of the case with a view towards possible criminal prosecution and this has taken place, I say again, before the execution of any consent judgments.

My question is, based upon the policies and practices of the SEC as they existed in 1975 and within the context of those particular assumed facts, was there an obligation on the part of the SEC staff attorney to disclose to the attorneys representing the private individuals, that the matter had been referred to the United States Attorney?

MR. CUTNER: Your Honor, may I most respectfully make an objection.

The basis for it is, is that it seems to me to be an effort to recount much of the theory that has been presented in this hearing and I think in order to get an accurate answer in terms of the context of the facts that have been developed here, that it is important for Mr. Sporkin to know or to answer the question in terms of knowing that it is Milton Gould and Bill Moran we are talking about, or Milton Gould who was making the proposal, if it can be called a proposal, in the particular way that he makes proposals at that initial meeting, in order to accurately answer what your Honor is asking within the context of this case.

THE COURT: It is a hypothetical question, Mr. Cutner. If the witness feels he can't respond to it without knowing more of the factors, he may certainly tell me so, or his answer may be made the subject of further examination; but if my question has not been driven from your mind by this colloquy --

THE WITNESS: I understand the question.

Q Can you answer it?

A Yes.

I have to answer on two parts, one on a legal basis and what I would do.

On a legal basis, it might be unfortunate, but I don't think legally that there would be anything to stand on other than to say later on they may want to bust the civil suit. They may say we were misled.

Q Bust the civil suit?

A In a sense saying we were misled into the civil suit and therefore we would like to seek to have the injunctions rescinded and what have you.

Q Reopen the consent judgment?

A Reopen it, because it would seem to me in that type of situation where you don't have in effect anybody giving information which was incriminating, I don't see how it can hurt the criminal aspect of the case.

On my own personal view, knowing all the facts you were saying, and this is the way I live my life and as a fairness matter, strictly in terms of fairness, I certainly would have -- I don't know whether I would have told them that the matter is over in the courthouse now, but I certainly would have said to him -- because I might not be permitted to tell him -- but I certainly would have said to him discount 100 per cent any thought in your mind that this will settle a possible criminal action. Take that as zero in your determination. If you still then want to go through with the settlement, that is up to you, but it clearly goes only to the question of the negotiation of the civil aspects of the case.

Q Are you aware of any law, rule or regulation which within the context of my hypothetical question to you, would have prevented the SEC staff attorney from making full disclosure to the other lawyers as to the status of the review in the United States Attorney's office?

I am just thinking for a second, your Honor, if I may.

The answer would be, I am not aware of anything except that discussions between our office and the U.S. Attorney's office are very sensitive, and there are instances where either the U.S. Attorney or our people do not want to disclose those facts. It may depend upon a number of kinds of things.

For example, suppose the U.S. Attorney, and I am not trying to vary your hypothetical, but suppose the U. S.Attorney has an informant in the same matter which somehow if you then disclose everything you will have to disclose the fact there is an informant; but that doesn't mean that you can't do what is, namely, say, if that is in your mind, Mr.X, discount it completely. I will not tell you why, but assume, if you will, the worst can happen and make that the basis of your determination in the civil action.

Again, that is the way I would operate, but that doesn't mean it's required. REmember, you have a different level of beliefs and principles down the line.

The only harm is in a case like that, apparently we have obtained a civil determination which may well be put in question, but unless he is given some information in the criminal aspect as to whether that should somehow hurt the other case --

THE COURT: That is helpful to me. Thank you.

MR. BENDER: Your Honor, I just wondered if I may ask Mr.Sporkin just one or two questions which may or may not be helpful, but I hope it will be to your Honor.

THE COURT: By all means.

CROSS-EXAMINATION (continued)

BY MR. BENDER:

Q Mr.Sporkin, you are aware the Internal Revenue Service is of course mandated by Congress to dispose of civil claims for taxes against citizens, are you not?

A The Internal Revenue Service --

(Question read.)

MR. BENDER: I will withdraw it.

occurred or not. I know there were admissions made and to the extent that your Honor is relying ultimately -- I am not rearguing this motion -- ultimately on the fact that the Rodman admissions were delivered to the grand jury, I don't know that that occurred. I am not sure whether they were conveyed to the grand jury or not. Whatever effect that has later down the line, I just want to note it now.

THE COURT: I had the impression they were revealed to the grand jury. If I am wrong in understanding Rodman, I know that a lot of you will help me understand it correctly.

Even if I am wrong in my recollection of Rodman on that particular point, I would adhere to the ruling I have made under 6E.

MR. NAFTALIS: I was not attempting to reopen this point nor should that change your Honor's ruling. I was just speaking prospectively for later arguments.

THE COURT: You may proceed, Mr.Cutner with your next witness.

MR. CUTNER: Your Honor, before I call the next Government witness, I have been advised over the noon hour that in certain respects the statement that I made at page 8 of the transcript in response to Mr.Bender's rkb-5

request for a stipulation, is not accurate and I want it corrected at this time.

I am referring to, I guess, the second paragraph of my statement on page 8 where you said,"That request was forwarded by the New York regional office to the Division of Enforcement in Washington where it was passed along to the Commissioners of the SEC and ruled upon in favor of turning the files over to the U. S. Attorney."

I have been all along asking the SEC to provide to me the documents relating to the turning of the files over to the U.S. Attorney and I was advised today, there are no such documents, there do not appear to be any such documents, so it appears -- and I am so advised by the SEC -- that the Commissioners did not rule on turning over the SEC files to the U. S. Attorney in this case.

I am also advised that the Commission entered an order nunc pro tunc today that the files could be turned over, but it does not appear that was done prior to the time that the files were turned over, your Honor.

MR. BENDER: Excuse me. Is this a concession to the effect that the Commission passed upon a request from the U. S. Attorney's office to turn the files over and consented to do so in admission that Mr. Sporkin's testimony was inaccurate in that respect?

Q All right, if you would go ahead with who said what at the meeting.

A Mr. Gould said that these three individuals -- that there had been some serious improprieties with regard to the common stock of TDA, and that these three individuals were responsible for it.

He then generally outlined what the improprieties were, and thereafter, in response to questions from myself and Nortman and Malowsky, too, Mr. Kantor really furnished us with more or less the specifics.

Q If you would, tell us what Mr. Gould and Mr. Kantor said about the improprieties.

A He said that there was a group of shareholders of TDA who were, as they characterized it, seed money investors, who had purchased stock directly from the company in the late '60s, and that in '71 -- around 1971 the seed money group requested that TDA include their shares in a public offering which it would be making in the near future; that members of the management of TDA had refused to include the shares in the public offering, notwithstanding the fact that there was what was commonly referred to as piggyback rides, or the right to have those shares included in the public offering. When they refused to include the shares in the public offering they did advise the seed money group that they knew of a buyer who would buy the shares from them, not at the market value but somewhat below the market value, and that in fact the seed money group had sold their shares to this buyer, this buyer had resold the shares shortly thereafter, realizing a profit in excess of $400,000, and that Mr. Fields, Friedman and Davis had a 70 percent interest in those profits.

They also advised us that the matter had been the subject of an investigation by the District Attorney's Office in Manhattan for the previous eight months, and that the District Attorney's Office had concluded that there was no cognizable offense in the state law that they would prosecute.

Mr. Gould kept referring to his clients as chevrah, which finally Mr. Moran demanded a translation of -- apparently it translates roughly from Yiddish to English as "brotherhood."

Q Who gave the translation?

A Mr. Gould. He said it was a shocking matter -- Mr. Gould said that -- that he knew of Mr. Davis or perceived him as an up-and-coming bright light in the legal community, especially the Securities Bar -- and again he uses another Yiddish expression which I think translates as: "He was a Gentile with a Jewish head."

Kantor really furnished us with the specifics about how the transactions were affected.

They also raised the fact that the DA's investigation included an inquiry into whether some sham finders' fees had been paid by TDA in connection with some acquisitions that the company had made, and whether Fields, Friedman and Davis had somehow benefitted directly or indirectly from those sham finders' fees, although both Mr. Gould and Mr. Kantor said that there was no conclusive evidence or that they were not satisfied that in fact the sham finder's fees had been paid by the Government.

Mr. Gould suggested that we conduct an investigation, and that when we conclude our investigation we give him an opportunity to discuss some sort of a resolution of the case.

Mr. Nortman said to Mr. Gould that "Whatever action we took here would probably include or could include a 2(e) proceeding under the Commission's Rules of Practice," which would preclude Mr. Davis from practicing before the Commission any further.

Mr. Gould responded that he would be lucky if he could preserv e Mr. Davis's right to practice before anybody, and at this point he just wanted to keep him out of jail.

Mr. Kantor said that now he was corporate counsel for TDA, that he was going to try to ascertain what, if any, misappropriations of corporate assets had occurred, and try to take the necessary steps to make the corporation whole; and also take whatever steps were necessary to prevent a repetition of this type of conduct.

I think I or Nortman asked some questions with regard to the present viability of TDA. Based on what we had been told, I was concerned that there wasn't a need for some immediate relief in the form of an installation of a receiver, and consequently I wanted to find out whether the company was still operating, whether it was still in some sort of viable condition, and Mr. Kantor assured us that it was, that it was in fact profitable; and he indicated that Mr. Fields and Mr. Friedman were the reason that the company was in existence at all, because they turned it around from a losing proposition to a fairly healthy corporation -- and that's about all I can recollect of the meeting.

Q At the conclusion of the meeting, or by the conclusion of the meeting, was there any agreement or understanding concerning how the case would proceed from that point on?

A Only that they -- Mr. Gould suggested that we conduct an inquiry. Mr. Kantor said that he would make don't recall for sure but at some point along the way I did say to him, "I am troubled by filing a document like this. It seems to me that it is not accurate from what we know" -- but that is my only recollection.

THE COURT: Mr. Tucker, what was your position with the SEC in 1975? Did you hold then the position you hold now?

THE WITNESS: No, your Honor. I was the branch chief -- a branch chief until May of -- late May of 1975, at which point Bill Norman departed, and I was made Acting Assistant Regional Administrator -- I think officially appointed in July of 1975.

THE COURT: All right.

Q Now following the January 14th meeting, Mr. Tucker, what is the next thing that happened in the case that you recall?

A Around, I think it was the 17th, we received the proposed or the draft 8-K report, and was about the 17th--

Q Still in January?

A Still in January -- and myself, Nortman, and I think Meyer Goldman, an investigator in our office, met at the office of the District Attorney of Manhattan with the attorney who had been conducting the investigation, Peter Driscoll, and also his accountant whose name escapes me for the moment.

At that meeting they advised us of their understanding of what had happened in this case. They had several memoranda which they supplied us with, and also advised us that they were going to come and tell us about this whole matter, but when they advised Mr. Gould that they were going to come and tell us, he requested that they delay bringing it to our attention until he had an opportunity to do so. They felt that there was a crime but that the prosecution of the crime would be very difficult because they lacked a certain amount of corroboration, but they did supply us with the information that they had developed in their investigation.

Q Can you identify whom you spoke with in the District Attorney's office?

A Peter Driscoll was the Assistant District Attorney. Now I know Mollie Strum had worked on the case but I believe at that point only Driscoll was assigned to the case, and there was a Cradler --

A VOICE: Radler, R-a-d-l-e-r.

A Radler, who was an accountant with the DA's office. He met with us, and I think there was also one of their investigators who walked in and out during the meeting -- he really wasn't present very much.

be that.

Q Now what, if anything, happened on September 4, 1975 with respect to this case?

A Myself and Stuart Perlmutter met with Mr. Gould -- I think it was in the early afternoon on September 4th.

We were aware that the Commission was going to consider this matter on September 4th, and it also appeared that there wouldn't be any difficulty or there weren't any major problems with the case.

Accordingly, we were rather certain that the Commission would approve our recommendation on the 4th.

Prior to the 4th, I called Mr. Gould and told him that we were in a position -- we would be in a position to discuss some resolution of this matter on September 4th, and he agreed to come down to our offices on that day.

THE COURT: And the precise recommendation that you anticipated approval of from the Commission was what, Mr. Tucker?

THE WITNESS: The authorization to seek injunctive relief, the ancillary relief and the authority to discuss settlement.

THE COURT: Thank you.

Q Now, you had a meeting on September 4th. Who was present at the meeting?

A Mr. Perlmutter, myself and Mr. Gould.

Q Will you tell us who said what at the meeting on September 4th?

A It is one of the few instances where I had a meeting with Mr. Gould where I did most of the talking, but I told himk that we were authorized and would in fact seek broad ancillary -- broad injunctive relief to restrain the defendants from further violations of various provisions of the Federal Securities Law.

Q Would you explain what you mean by "broad injunctive relief"?

A Well, the injunction can run to a specific security or any security, and the Commission is very reluctant and generally seek injunctive relief as to any security.

Accordingly, I wanted to make certain that he understood we were not seeking injunctive relief only as to TDA or Westcalind, but as to any other security, and there were a whole host of specific sections and rules promulgated thereunder that we would allege were violated and would seek an injunction from further violation.

I also then identified the varying types of ancillary relief we would want, starting with disgorgement of monies improperly obtained.

Q I would like you to state as best you can what you said to Mr. Gould at the meeting --

A Okay.

Q -- concerning each one of the proposed ancillary reliefs?

A As to the ancillary relief, I said we would want the defendants to disgorge any and all monies improperly obtained as a result of their wrongful conduct.

I believe I identified four principal areas that the disgorgement would come from. That was the two finders' -- the two sham finders' fees -- well, I guess the funds of which ultimately went to Mr. Sandberg, which were used to buy some TDA stock.

Accordingly, we would want to seek the return of the TDA stock to the company, and the fourth area, and the largest one, was the 400-plus thousand that had been obtained in the resale of the seed money investors' shares.

Mr. Gould had a legal pad and just made notes -- or I believe made notes as I enumerated each of these items.

I told him that we would also seek the removal of Fields and Friedman as officers and directors of the company, and that we would seek the installation of a receiver, since there would be an absence of senior management by virtue of the removal of these two people from the company.

I told him we would want a restructure of the board of directors, to provide for independent directors, and that we woul[illegible] to impose a freeze of the voting of any of Fields [illegible] Friedman's shares.

There were some preferred shares, I believe, and I told him it would cover the common and preferred, and what-have-you -- I think Mr. Fields had a substantial block of preferred -- of one of the preferred issues.

He did not say anything. He just kept making notes, just kept writing as I was talking.

Q When you say "he," do you mean Mr. --

A Mr. Gould, yes; and at the conclusion of identifying the various forms of ancillary relief that we would seek, I said to him "And there is no deal on criminal," at which point Mr. Gould had his pipe in his mouth and a lit lighter or match, and he was reaching over for an ashtray which was on the desk, some distance from the desk that we were all sitting around, and he grabbed the ashtray, he put it down in front of him, he started the pipe in his mouth, and he was puffing, and what-have-you -- he had recently lit the pipe, and he started to nod his head in this manner (indicating).

Q When you say "in this manner," you are talking about up and down?

A Up and down. And he ultimately put the lighter or the match down, took the pipe out of his mouth and he said, "I know that."

And that was the end of the meeting.

I was very surprised because he didn't say anything. He said he would have to check with his clients.

We anticipated some extensive negotiation but it did not occur, and he simply said "I have to speak to my clients."

That was the end of the meeting with regard to TDA.

We then had another chit-chat about other matters, and that was the end.

THE COURT: What was it in particular that surprised you about Mr. Gould's response or reaction? You described what happened and you said at the conclusion of what it was that happened you experienced a feeling of surprise.

What was it specifically that surprised you, Mr. Tucker?

THE WITNESS: I anticipated his starting to negotiate --

of the disgorgement. We identified it as being in excess of $550,000 less what had already been turned over by the defendants to the company. I think Judge Streit said that is an awful lot of money, but we felt there was no compelling reason to seek any less than the full amount.

Mr. Ellis then, for the most part, although I think Judge Streit added something, attempted to persuade us not to seek the removal of Fields and Friedman as officers and directors of the company. He contended that they were the life blood of the company and they had made a successful operation; that it was imperative to the continued viability of the company that they remain as officers and that it was in the public interest not to seek their removal.

That was the principal discussion at that meeting.

I think at that meeting I suggested if we were to withdraw our prayer to remove Fields and Friedman as officers of the company, that if they remained with the company, we would want some sort of special master appointed to conduct an examination to determine what if any misappropriations occurred, any improprieties,and I know Mr. Kantor was very opposed to that situation.

We were putting our cards on the table and it appeared so were the defense counsel.

Again, the principal focus was on retaining

Q Did anyone bring up the subject of a criminal reference?

A No.

Q Did Judge Streit say at any time with reference to the amount of money that you were seeking, the so-called disgorgement, did Judge Streit say, "Jeff, this is a horrendous amount. There is a serious question about the defendants' liability concerning some of these figures, but in light of the fact there is to be no criminal prosecution, I shall endeavor to obtain the money for you".

Did he ay that in words or in substance at any time?

A No.

Q Did Judge Streit propose to you at any time a lesser dollar figure than the amount you were asking for?

A No.

Q Did any counsel on behalf of Fields, Friedman or Davis propose a lesser dollar figure?

A No.

Q Let me direct your attention to October, late October or early November 1975. Did you have a meeting during that period with a man named C. Leonard Gordon?

A Yes.

Q Who was present at that meeting?

Q Now did Mr. Gordon ask whether or not there was going to be a criminal prosecution there?

MR. OSTROW: I object to this, your Honor. I object on the same grounds as Mr. Naftalis suggested before. He is giving his recommendation, including the tennis club and the goodbye at the door.

I assume he would have included that if it had happened.

THE COURT: I will sustain the objection.

Mr. Tucker, have you in the answer you have just given told us everything that you can remember in your conversation with Mr. Gordon on that occasion?

THE WITNESS: Yes.

THE COURT: All right. If I were to tell you that Mr. Gordon had testified at these proceedings that at that meeting Mr. Gordon expressed the importance to Mr. Mosler that there not be a criminal reference, so that in that manner the subject of a possible criminal reference came up at this conversation, is it your testimony that Mr. Gordon never said anything of that nature, or is it simply today you do not remember his having said it?

THE WITNESS: It was never said, your Honor.

THE COURT: All right.

Q Now let me direct your attention to May of

1976, Mr. Tucker. Did you have a conversation with Mr. Kantor at that time?

A Yes.

Q Was that in person or over the telephone?

A Over the telephone.

Q Could you relate to us the conversation you had with Mr. Kantor?

A We had still not come to an agreement on the independent directors, so when -- the first part of the conversation I think dealt with our efforts to obtain the independent director with some law enforcement background.

He then said to me "I have been to see Dave Cutner at the U. S. Attorney's office, and I want to say I am glad that I could find out that the case, the matter was not referred but rather got over there via a request by the U. S. Attorney."

He said words of that substance.

Q And what response, if any, did you make to Mr. Kantor?

A I made very little. I think I said "Okay."

Q Do you remember anything else about that conversation, Mr. Tucker?

A No.

MR. CUTNER: I have nothing further, your Honor.

Q What date is that memo dated?

A You mean what day was the oral agreement reached?

Q I stand corrected.

There were two oral agreements with Mr. Weston, there was first an agreement with his counsel which perhaps I am using the wrong word when I say agreement. There was an understanding, perhaps unexpressed, that what was proffered to you would not be used against Mr. McGuire.

There was a second understanding memorialized in your memorandum and Mr. Perlmutter's memorandum?

A That is correct.

Q What day was that second oral understanding reache with Mr.Weston's counsel?

A May 1st.

Q What is the date of the memorandum?

A May 1st.

Q It was pointed out I may be using the wrong word. It was Marcheso and Schlossberg for Weston. I may have misspoken.

The May 1st memorandum, was that prepared on the same day that an understanding was reached with Mr. Weston's counsel?

A It appears to have been. Mr. Perlmutter prepared it, so I am not certain. It is dated May 1st.

Q Is that the ordinary procedure? This is an agreement of substantial importance, is that correct?

A Yes.

Q Is it the normal procedure when you reach an agreement of substantial importance, you make a contemporaneous memorandum?

A It's good practice.

Q Is there any regulation or internal manual or internal rule or practice that is supposed to be followed in that connection?

A I don't know.

Q Do you follow it?

A As best I can.

Q I show you Exhibit 17, which is a memorandum to the file regarding Kreisler. What is the date of that memorandum?

A April 7th.

Q On what date was the agreement reflected in that memorandum reached?

A March 18th is the day he testified.

Q My question was when the agreement was reached.

A Some time prior to March 1 8.

Q Were you reminded to put a memorandum to that effect in the file?

A I don't understand your question.

Q There is a gap of roughly three weeks between the date that the understanding was reached and the date of that memorandum, isn't there?

A Yes.

Q Which you say is not the normal practice, and not the practice you try to follow?

A Correct.

Q And you wrote that memorandum?

A I think Mr. Perlmutter wrote this.

Q Didn't you testify before it was Mr. Perlmutter who wrote the one relating to Weston, but you the one relating to Kreisler?

A I think he wrote them both. I was present when we worked out the understanding with Mr. McGuire. I don't believe I was present on May 1st when Schlossberg and Marcheso came in with Mr. Weston. I believe I was in Minneapolis on business and spoke with Mr. Perlmutter by phone early that day, and he conveyed to me the substance of what occurred on May 1st, but I don't believe I prepared either of them, Mr. Frankel.

Q Prior to the agreements reflected in those two agreements, 17th and 18th, did anyone in the New York regional office consult with anyone in Washington concerning the matters that are reflected in those memos?

A I don't think so.

Q Whose decision was it to enter into those agreements? Whose decision on the SEC side?

A It's a decision made by Mr. Nortman, myself, Mr. Perlmutter. I think we obtained the concurrence of Mr. Malowsky.

Q Did you and Perlmutter make a recommendation that that proposal be accepted?

A Orally?

Q Yes.

A I am sure we did. It was our idea.

Q There was no authority you sought from Washington when you entered into that arrangement?

A No.

THE COURT: Does it follow, then, that it was not necessary for you to obtain authority from Washington to enter into the sort of agreements that are referred to in those exhibits?

THE WITNESS: Yes, Judge.

Q When Mr. Gould came to you with Mr. Kantor on January 14, that is, came to the SEC offices, I believe your testimony was that with reference to Mr Davis, he said that he wanted to keep him out of jail, is that correct?

A Yes.

Q Are you sure he didn't say that with reference -- did you understand that he represented three clients, Davis, Fields and Friedman?

A Yes.

Q Are you sure he didn't make that statement with regard to all three of his clients, rather than Davis?

A He only made it with regard to Davis. It was in response to a comment by Mr. Nortman about the potential 2E proceeding growing out of this matter and his response was,as I said, yes, he wanted to keep him out of jail.

I think his response was addressed only to Mr. Davis.

Q Did you understand him to say at any time during the course of that meeting, that he wanted to keep all of his clients out of jail?

A No.

Q Do you recall being interviewed by Mr. Bender and myself about two weeks ago in your office?

A Yes.

Q Do you recall telling us that Mr.Davis -- that Mr.Gould's statement was made -- you understood it to be made with reference to Fields, Friedman and Davis?

interview a couple of weeks ago with Mr.Bender and Mr. Frankel, Mr.Tucker gave an answer which is inconsistent with what he said on this trial.

I want to explore that further.

What is your best recollection, Mr. Tucker, of what you said to Messrs. Bender and Frankel on this point during this interview two weeks ago?

THE WITNESS: I think what I said to them, I was aware or I perceived that Mr.Gould's purpose in coming forward at that time was to try to obtain the best possible deal for his clients and it couldn't not occur to me that one of the things he obviously was seeking was to prevent all of them from going to jail, but the comment on the 14th was addressed directly in response to a statement made by Mr. Nortman about Mr. Davis,and Mr. Gould said I just want to keep him out of jail. He did say "him", as opposed to "them" although my perception of what occurred at that meeting or what Mr.Gould's hope was, was to keep everybody out of jail.

THE COURT: That is helpful and indeed it is what I would expect. You are not suggesting, I take it, that Mr.Gould's thought processes as you understood them was to keep Mr. Davis out of prison, but to not care one way or the other whether Mr.Fields or Mr.Friedman went to prison.

THE WITNESS: No.

THE COURT: It was quite clear in your mind the objective was to keep all three of them out of prison if he could do so?

THE WITNESS: Yes.

Q Was that clear in your mind from January 14 up to the time of the meeting that you have testified to on September 4?

A Yes.

May I clarify that response?

Q I would like you to just answer the question, to be perfectly frank with you.

MR. CUTNER: May he answer the question?

A I think it would be an answer to the question.

THE COURT: Go ahead.

A I perceived this issue. I perceived Mr. Gould as having an interest in this issue, a concern about this issue from January 14 to September 4.

Q Up until September 4, did you ever make any comment to Mr. Gould about it?

A No.

Q Or Mr. Kantor?

A No.

Q Did you ever tell him up until September 4, "Look, if you are trying to avoid a criminal reference or criminal proceeding in pursuing these meetings or these discussions we are having, you are barking up the wrong tree"?

A No.

Q Were you aware on each and every occasion that you spoke with Kantor and Gould that they did have as their primary objective, avoiding a criminal reference of this matter?

A No. I would say it was one of their primary objectives. I thought their other primary objective was to retain Fields and Friedman as officers of the company.

Q Would you say those were their two primary objectives?

A Yes.

Q Would you say that you perceived those as being their two primary objectives throughout the period January 14 up through September 4?

A Yes.

THE COURT: Is it fair to sa yas a practical matter, Mr. Tucker, that these two primary objectives that you told me about, (1), keeping Fields and Friedman in as officers, and (2), keeping everybody out of prison, interrelate with each other and by that I mean this: If Mr. Fields and Mr. Friedman were in prison, they very well could not continue as officers, is that correct?

THE WITNESS: Correct.

Q Were others present at the various meetings or conversations that you had with Mr. Gould and Kantor up to September 4?

A Yes.

Q Was Judge Streit at any of those meetings or conversations?

A Yes.

Q Would you just enumerate the list of people from the SEC side that were present at these meetings or discussions up to September 4?

A Mr. Moran, Mr. Malowsky, Mr. Nortman, Mr. Perlmutter, Mr.Goldman. I don't know if Mr. Pernik was at any of the meetings prior to September 4. Mr. Gould, Mr. Kantor, Judge Streit, Mr. Ferber, I am pretty sure --

Q I was just asking from the SEC side.

A I am sorry.

That is all the people.

Q Did you ever hear any of them say up until September 4, "Listen fellows, you are barking up the wrong tree if you are trying to avoid a criminal reference or a criminal prosecution here", or words of similar import?

A I never heard that.

or requirements that the SEC would have to settle this matter, you testified that you said to Mr. Gould, "And there is no deal on criminal." Is that what you said to him?

A Yes.

Q Do you know Mr. Gould's reputation?

A With regard to what?

Q As an advocate.

A Yes.

Q Would it be accurate to characterize that reputation as being a forceful, vigorous, assertive advocate for his client's position?

A Yes.

Q And have you given us the entirety of Mr. Gould's response when you said "You understand there is no deal on criminal" -- the entirety of it?

A "I know that."

Q He didn't try to talk you out of it?

A As I said on direct, he didn't say anything with regard to the settlement or anything else I said. He simply said, "I have to get back to my clients and talk to them."

Q Do you recall that when you said "And there is no deal on criminal," Mr. Gould had his pipe in his hand

-- in his mouth?

A He had it in his mouth.

Q You are sure of that.

A Yes.

Q And are you sure that he had his lighter lit?

A Yes, because he was puffing on his pipe.

Q You are sure he was reaching over for an ashtray?

A Yes.

Q You are sure he grabbed the ashtray.

A Yes.

Q And you are sure he put it down in front of him?

A Yes.

Q And he put his pipe into his mouth and started puffing.

A He had it in his mouth as he reached over for the ashtray. He put it down in front of him, the ashtray, and then took the pipe out of his mouth. While the pipe was still in his mouth he was acknowledging what I was saying to him, and when he took the pipe from his mouth he then said, "I understand."

Q Are you sure of that sequence?

A Yes.

Q How soon after these events occurred did you first try to reconstruct that sequence?

A Spring or early summer of 1976.

Q About nine months after this happened?

A Yes.

Q Did you have any documents to refresh your recollection about that sequence?

A No.

THE COURT: I think we will break for lunch now, Mr. Frankel.

I would like to resume at two o'clock, please.

(Luncheon recess taken.)

- - -

THE WITNESS: I believe Judge Streit and Mr. Gould were in my office on December 1st and I believe it was at that time that Mr.Gould said you got a great settlement.

I would say by that date, we were pretty much agreed on the terms. It was simply a question of tying up the collateral for the disgorgement that took some time and protracted the process which led to the ultimate offering of the consent decrees.

(continued on next page.)

1 PM

A There were no substantive settlement negotiations prior to September 4.

Q The only substantive talk was on September 4th -- the only substantive talk up until filing of the complaint was on September 4, 1975, is that correct?

A Yes.

Q Do you recall a memo written in January of 1976 to the Commission requesting approval of the settlement terms that had been agreed upon by the New York Regional Office and counsel for the defendants?

A Yes.

THE COURT: In January 1976 did you say?

MR. FRANKEL: Yes. I think I will be able to explain it in my next question.

Q Is it the practice after a settlement, after the terms of a settlement have been worked out between the Regional Office and the defendants, for the Regional Office to forward a memo to Washington seeking Washington's approval of those terms?

A If the terms of the settlement differ from the type of relief sought initially in the complaint, it is an obligation of the Regional Office to obtain Commission approval of the settlement reached between the parties.

THE COURT: And is that approval sought from

Washington even subsequent to the filing of a consent judgment? I ask that question, Mr. Tucker, because I am under the impression from the evidence in the case that the consent judgments were signed in December of 1975.

THE WITNESS: I don't believe so, your Honor. The consent decrees should not be filed until the Commission authorizes a settlement.

MR. CUTNER: Your Honor, it was the consent to the entry of judgment that was signed in December. The judgments themselves were not filed, I believe Mr. Tucker testified, until February.

THE COURT: I understand.

MR. FRANKEL: You did not say September?

MR. CUTNER: I am sorry, the consent to entry of judgment was signed by the defendants in December, and the judgments were not filed until February of 1976.

THE COURT: All right, thank you.

BY MR. FRANKEL:

Q Do you recall that such a report in January 1976 was written in the New York office and forwarded to Washington?

A Yes.

Q Did you participate in the writing of that report?

A I edited that report. It was written by Stu Perlmutter, and my recollection is that there was very little editing to be done. I didn't write any of the sections of it.

Q As the editor of that report, it would be your job not just to correct typographical errors but to correct errors of substance?

A Correct.

Q Do you recall reading in that report at page 5:

> "On September 16, 1975, after being unable to reach a settlement with counsel for the above defendants, the staff of the New York Regional Office filed a complaint in the above action."

A Yes.

Q Do you recall reading that at the time this report was written?

A Yes.

Q And when you edited it?

A Yes.

Q Did you believe that statement to be a correct statement when you read it?

A Yes.

Q As of the time date, September 16, 1975, there the defendants affixed their consents?

MR. CUTNER: Whatever is in the judgment is in the judgment. It is in evidence, or at least it is a part of defendants' moving papers.

THE COURT: That is true, but we are also concerned with what was agreed at what time and in what form.

I will permit the answer.

A I don't believe it was in the judgment. I do not believe it was in the judgment or consent decree. I am really not sure.

Q During that meeting on December 1, did Gould and Judge Streit and I don't suppose I can ask this with respect to Mr. Kantor since you don't remember him as being present, but did they refer to you as "Jeff"?

A I think they did, yes.

Q Did you refer to Mr.Gould as "Milt" or "Milton"?

A Yes.

Q What did you refer to Judge Streit as?

A Saul.

Q What did you refer to Herb Kantor as?

A Herb, Herbert.

Q How long had you been on a first name basis with these three attorneys and they with you?

A I knew Mr.Gould prior to January 14, 1975, not very well. I had only met him a couple of times. I don't think we were on a first name basis until probably February 28.

Judge Streit, probably September 30, around then. I doubt we were on a first name basis on February 21, and Mr. Kantor I would say soon after the January 14, 1975 meeting, because I had considerable contact with Mr. Kantor right after the matter was brought to our attention as opposed to Mr. Gould or Judge Streit.

Q He had provided you with documents from time to time when you requested them, hadn't he?

A Yes.

Q Would you characterize him as having been cooperative with you in your requests you made from time to time with respect to documents or information?

A Yes.

Q On the same day, December 1, did you meet with or speak with Assistant United States Attorney John Wing of the U. S.Attorney's office for the Southern District of New York?

A I spoke to him by phone.

Q Do you recall what time that phone conversation was?

A Probably closer to 4:00.

Q Was it shortly after Gould and Judge Streit and perhaps Kantor left your office?

A Yes.

Q It couldn't have been more than a couple of minutes after they left?

A Probably a half hour.

THE COURT: I will take a brief recess at this point.

(Recess.)

(continued on next page.)

THE COURT: Now, Mr. Frankel, before we go further on the subject you just started, I want to ask one more question about the December 1st meeting. I know this intensely is irritating to you but I must act upon these thoughts while I still have them.

MR. FRANKEL: I welcome them.

THE COURT: Am I right in thinking, Mr. Tucker, one of the sub jects in the December 1st meeting was a question of collateral that would underlie the payments to be made by the defendants?

THE WITNESS: The question, I believe, was discussed, your Honor, to the extent that we said we would want collateral.

THE COURT: Yes.

THE WITNESS: I don't know if we went into the details of the type of collateral or what have you. I think that was after December 1st.

THE COURT: But at least on December 1st the question of collateral was touched upon.

THE WITNESS: Yes.

THE COURT: Now that question of collateral was necessary to consider because another aspect of the settlement called for a payment of the amounts in question over a period of time of thirty months; is that not so?

THE WITNESS: That is correct.

THE COURT: All right, that's all.

BY MR. FRANKEL:

Q Along the same lines, did Judge Streit tell you that his clients had liquidity problems during that period?

A Yes, he did.

Q Did you tell any of the attorneys who were there with you that afternoon that within minutes of their leaving that meeting you were going to make a call to the U. S. Attorney's office with reference to this case?

A I didn't tell them anything along those lines.

Q Did you speak with Mr. Wing right after they left -- minutes after they left?

A I went down to Mr. Malowsky's office to tell them that it looked like we had a settlement with TDA, and while I was talking with Mr. Malowsky I believe a call came in from Mr. Wing on an unrelated matter, and while we were both in the office I brought the matter to Mr. Wing's attention. We both were on telephones in Mr. Malowsky's office. I brought the matter to Mr. Wing's attention. I believe the call came in from Mr. Wing.

Q But it wasn't a call about this case, was it?

A No, it wasn't.

Q It was you who brought to Mr. Wing's attention this case, is that correct?

A Yes.

Q Did you follow up your conversation with Mr. Wing by a letter to him?

A Yes.

Q Did the letter go out on that date?

A I believe so.

Q Was the letter dictated that date?

A I believe it was, yes.

Q Do you have that letter in Exhibit M?

A Which one?

Q The letter that you sent --

A Which exhibit -- M?

Q Exhibit M.

(The witness examines.)

MR. CUTNER: I have that letter, your Honor. It was addressed to Mr. Wing and came in our files.

Q There is a copy of this letter in your files, isn't there?

(The witness examines.)

MR. CUTNER: I also have a copy, your Honor.

MR. FRANKEL: I don't believe that copy comes from Exhibit M.

THE COURT: The first document which Mr. Cutner just demonstrated has two holes punched at the top and so they are a matter which I have come to associate with the SEC file; but it may not be exclusive.

A I have a copy of the letter in the A10-2 file.

MR. FRANKEL: Your Honor, I was going to ask the witness to read it, but may I just give it to your Honor? I think maybe your Honor later on would want to read it -- a one-page letter.

THE COURT: Yes. It is in evidence, of course, as part of Exhibit M.

(Mr. Frankel hands to the Court who examines.)

Q Mr. Tucker, when did you first tell Mr. Gould that you had that conversation on December 1st with Mr. Wing and/or that you sent that letter dated December 1st to Mr. Wing?

A I don't think I ever told that to Mr. Gould.

Q When is the first time that you told Judge Streit that you had that conversation or that you sent that letter?

A I don't think I ever told anybody that I had that conversation -- any of defense counsel that I had that conversation on December 1st or sent that letter.

Q On December 1st you testified that Mr. Gould said to you, in substance, among the other things that were said at that meeting, "Jeff, you have got a great settlement," is that correct?

A Correct.

Q How would you characterize the settlement that the SEC got in this case? Would you call it poor, fair, good, excellent or superb?

MR. CUTNER: I object, your Honor.

THE COURT: Yes. The difficulty I have with that question is that I don't know by what standards these things are measured.

On the other hand, that may reflect more on my own understanding than that of the witness.

I will permit you to answer that, Mr. Tucker, if you can.

(Question read by the reporter.)

A I would say it was a good settlement.

Q Not excellent and not superb; it just falls right in the middle category?

A Yes. I would say it was good. As a matter of fact, I was criticized by peo[illegible]y staff for being so lenient.

Q So lenient. I see.

You were dealing with some fairly experienced and reputedly able lawyers on the other side, weren't you?

A Yes.

Q I would like to examine, if I may, some elements of the settlement that you say was only good.

There were three transactions that were involved in your complaint and in the settlement; is that correct?

A Correct.

Q One of those was the ERD transactions?

A Correct.

Q One of them was the $100,000 Eagle Roofing finder's fee.

A Correct.

Q And one of them was the $50,000 Trophies finder's fee; is that correct?

THE COURT: Which one is the Westcalind finder's fee?

MR. FRANKEL: That is the Eagle Roofing.

A VOICE: No.

MR. FRANKEL: No, that is the Trophies'.

THE COURT: Thank you.

Q With reference to the ERD transaction -- there were really two; is that right?

A Yes.

Q But I would shorten it and refer to them as a unit -- okay?

A Okay.

Q What was the total amount which your investigation showed any of the defendants in this action received?

A Literally received or obtained a beneficial interest in? I think the question should be more specific.

Q Well, if there is any ambiguity in the question please feel free to answer it in any way that is accurate.

A I think that these defendants obtained a beneficial interest in $280,000 of the $435,000 that was the total profit derived from the purchase and resale of the ERD shares.

THE COURT: By "these defendants" do you mean Fields, Friedman and Davis?

THE WITNESS: Yes.

A (Cont'g) I believe that these defendants obtained -- actually obtained $72,000.

Q $72,000 of $435,000?

A Correct.

Q What was the beneficial figure, did you say?

[illegible] 435.

Q No. I thought you said it was two-something.

A 435 was the total profit from the repurchase and sale of all ERD shares.

Q And of that 72-thousand and some-odd hundred went to these defendants?

A Yes, yes. They were entitled to 70 percent of the total.

Q I didn't ask you what they were entitled to. I asked you what they got, according to your investigation. They got 72-thousand some-odd hundred, right?

A You also asked me what they were beneficially entitled to.

Q How much did they physically receive according to your investigation?

A 72 thousand.

Q Did they receive a beneficial interest in some additional amount, out of the balance between 435 and 72?

A Yes.

Q And how much was that amount?

A Approximately 210 thousand.

Q Over and above the 72?

A Right.

Q What do you mean by "beneficial interest"?

A Well, the money belonged to them. It just never was furnished to them.

Q You mean they never got it?

A Correct.

Q It was dissipated by a third party; right?

A Correct.

Q Who, by the conclusion of your investigation, was dead?

A Correct.

Q So of the $435,000 involved, your evidence showed that they did not receive the difference between 435 and 72, or roughly $360,000?

A Correct.

THE COURT: This is the late Mr. Schoenbrun we have been referring to?

THE WITNESS: Yes.

Q According to that settlement they agreed to pay not only the 72 thousand which they received but the 363 thousand that they did not receive; is that correct?

A Correct.

Q Now would you call that aspect of the settlement good, fair or excellent?

A Excellent.

Q Or --

A Superb.

THE COURT: Five-Star Restaurant!

Q With reference to the Eagle Roofing transaction, how much did Fields -- did any of these defendants receive, according to your investigation?

A Any of which defendants? All defendants?

Q Yes.

A 82 thousand, I believe.

Q And how much was agreed to be returned to the corporation?

A 100 thousand.

Q So they agreed to put in 18 thousand that they did not receive --

A Correct.

Q -- is that correct?

A Well, I might add that it now involves a settlement with Mr. Sandberg, who agreed to return 35,000 shares of TDA which we alleged he purchased with $70,000 of the $100,000 of the finder's fee.

Q Is that included in the 82?

A Yes.

Q So they agreed to return 18,000 which they did not receive out of that 100,000?

A I think they agreed to return 30,000.

Q Which they didn't receive?

A Yes.

Q By the way, the "they" who are paying this money are Fields, Friedman and Davis, is that correct?

A Yes.

THE COURT: Well, "return" is a misnomer. They were paying it in, Mr. Tucker.

THE WITNESS: Yes.

Q Would you characterize this aspect of the settlement in which of the five categories?

A Superb.

Q In the Trophies' fider's fee situation, that involved $50,000, is that right?

A Yes.

Q According to your investigation how much of that $50,000 did any of these defendants receive?

A $35,000, I believe.

Q Who received that?

A I think Mr. Friedman.

Q And how much was agreed to be paid back?

A 50,000.

Q In other words, there was an agreement to pay to the corporation 15,000 that was never received, is that correct?

A Correct.

Q What category would you put that in?

A Excellent -- superb, I am sorry.

Q With reference to Mr. Sandberg, by the way, which you brought up, the usual procedure in getting a consent judgment actually entered is really -- is the usual procedure that you get the defendants to sign the consent judgment, you then forward it to Washington for Washington's approval before it is filed; or am I not correct?

A No. The consents for the final order are not forwarded to Washington.

Q Is a description of it forwarded?

A In the memo requesting authorization to enter into the settlement an outline of the proposed consent is set forth.

Q Well, do you usually -- do you require approval of the Department of Enforcement before you can finalize the settlement?

A The Commission requires it. The Commission requires that the proposed settlement be concurred in by both the Divsion and the General Counsel's office.

Q With reference to Sandberg, was it necessary to send down for such approval?

A No.

Q And was the reason that it was necessary to send down that not only was it superb as to Sandberg but you get every "i" dotted and every "t" crossed with reference to Mr. Sandberg, so far as you requested in your complaint?

A Correct.

Q What category would you put that in?

A Superb.

MR. OSTROW: I wonder if you could read back that part about allegedly "superb," counsel?

THE COURT: That is not going to help me, Mr. Ostrow.

Q With reference to the injunctive relief that you requested or demanded in the complaint and that you received in the settlement, what injunctive relief did you obtain and what did you not obtain that you had sought?

A We obtained all the injunctive relief.

Q What category would you put that in?

A Superb.

Q You did not get a receiver?

A Right.

Q But that was only a minor negative, wasn't it, considering what you did get?

A I am not sure what your question is.

Q Well, given the other relief that these defendants consented to, was it really important that you get a receiver?

A Yes.

Q I would like to read to you from page 8 of the report that went to Washington, which has your name at the end of it -- this is from Exhibit M:

> "The Commission sought the appointment of a receiver for TDA and Westcalind because it was believed that only by such a drastic remedy could the shareholders of TDA and Westcalind be assured that the self-dealing of Fields and Friedman would be prevented in the future. However, in view of (1) the agreement by TDA and Westcalind to appoint independent directors, (2) the agreement by Fields and Friedman to resign as directors of TDA and Westcalind for a period of two years and (3) the agreement by TDA to appoint a new chief executive officer who will be superior to Fields and Friedman, the primary reason underlying the Commission's request for a receiver--i.e., to prevent future waste of corporate assets--has been implemented in a manner that equitably balances the hardship to be imposed upon the defendants and the Commission's

objective to protect the public interest."

A That is correct.

Q Did you agree with that statement --

A Yes.

Q -- when you permitted your name to be put at the end of this report?

A Yes.

Q Do you agree with it today?

A Yes.

Q With reference to Mr. Davis, what relief did you seek during the course of these proceedings?

A We sought --

Q Let me narrow the question. With respect to Mr. Davis particularly -- professionally?

A In connection with the settlement he agreed -- to resign from the practice before the Commission.

I don't believe we prayed for that relief in our complaint. I believe it was simply an inevitability where he would consent to a judgment that he could be the subject of a 2(e) proceeding based on the injunction. Accordingly we settled or resolved the question of Mr. Davis' practice before the Commission in conjunction with the consent decree in the injunctive action.

Q Well, that was a matter that would eventually have been litigated in one form or another? You would have brought a 2(e) proceeding, wouldn't you have?

A Yes, were we to have been successful in obtaining an injunction, it would have acted as a predicate for a 2(e) proceeding.

Q But you did not have to do that?

A Right.

Q How would you characterize that type of relief that you got?

A Inevitable.

MR. NAFTALIS: Your Honor, I would object and move to strike. I would like him to answer on the scale we set up about rating restaurants -- superb or just merely average or good.

THE COURT: Well, I will permit the answer -- to stand. It can be inquired into on cross-examination.

I perceive a different form of classification there, Mr. Naftalis.

MR. NAFTALIS: All right.

Q Incidentally, did you negotiate the issue of collateral and what would be required?

A I was present through most of the discussions in that regard that were held in our office.

I also spoke to Judge Streit and Mr. Kantor of the posting of the collateral -- a different understanding with Judge Streit?

A I know there was some problem at the end with regard to the collateral, and I do believe we made some modification but I don't have a personal recollection of what the modification was.

Q But do you have a personal recollection that you and Mr. Perlmutter did it on your own without going to -- without getting approval from Washington or notifying Washington?

A Yes.

Q On May 3, 197[illegible], I believe you testified on direct that you got a telephone call from Herb Kantor, is that correct?

A Right.

Q Did Mr. Kantor say to you, in substance, that he was glad that he learned that you hadn't referred the case over to the U. S. Attorney's office but that they had requested the files?

A That's correct.

(Continued on next page.)

Q What did you respond?

A Okay, or words to that substance. I don't have an exact recollection. I know I heard the question and offered no substantive response to it.

Q Are you saying that you didn't correct him?

A I am saying i didn't correct him.

Q Subsequent to your letter to Mr.Wing on December 1, 1975, when was the next occasion that you know of or have heard of in which there was communication concerning this case between any member of the U. S. Attorney's office and any attorney or someone connected with the SEC?

A I think I spoke to Ira Sorkin, who was then an Assistant U.S. Attorney about this matter.

Q When did you speak with Mr.Sorkin?

A I think it probably was January of 1976. Possibly late December. I am not positive.

Q When was the next conversation or communication of any type between anyone at theSEC and anyone at the U.S. Attorney's office concerning this case?

A I had another brief conversation with Mr.Wing, which I believe is February of 1976.

Q And the next?

A March of '76.

Q With whom?

Q Do you read that in response to my question of whether there is in this report about your having had the phone conversation with Wing or sent the letter to Wing?

A Well, it relates to the interest of the United STates Attorney which was the subject of the December 1 -- which relates to the December 1st conversation.

Q Let me try to make the question more precise, if it wasn't adequately precise.

Is there anywhere in any of these quarterly reports a statement that would disclose to the reader of these reports that on or about December 1st you had a conversation with Mr. Wing along the lines that you have testified to and that on or about December 1, 1975, you sent a letter to Mr. Wing along the lines that are in that letter?

A No.

Q When the report to Washington in January of 1976 was prepared, was there any reference in that report or any disclosure in that report as to your having had that conversation with Mr. Wing or your having sent that letter to Mr. Wing?

A I don't believe so.

MR. FRANKEL: May we have this marked as Defendants' Exhibit U.

of the U. S. Attorney's Office --

A Correct.

Q In this district.

I think it has also been established that on that very same day, at approximately 2:30 or three o'clock in the afternoon, you met with Mr. Gould, Judge Streit, and perhaps Mr. Kantor, to finalize some of the terms of the civil settlement; is that correct?

A Correct.

Q And Mr. Gould said to you during the course of that meeting that "You have a great settlement. Take it." Is that correct?

A Correct.

Q And I take it there is no question but that during that meeting with Mr. Gould, Mr. Kantor and Judge Streit, that you did not disclose to them the fact that either earlier on the same day or perhaps it was sometime later on that day, you either had or were about to refer this case to the United States Attorney's office. Is that not a fact, sir?

A Correct.

Q In other words, you did not put all your cards on the table, didyou --

MR. CUTNER: I object, your Honor.

Q -- in connection with your conversation with them on that date. Is that not a fact?

MR. CUTNER: Your Honor --

THE COURT: I will sustain the objection. I think the question is argumentative.

Q Now did it occur to you, Mr. Tucker, that if you had disclosed this important fact that it might have had some adverse effect on this civil settlement that you worked so long and hard to obtain?

MR. CUTNER: I object, your Honor.

THE COURT: Overruled.

A Yes, it occurred to me.

Q And you certainly did not want to do anything that might jeopardize this important settlement in this important case, is that correct?

MR. CUTNER: I object, your Honor.

THE COURT: Overruled.

A I would -- yes, the answer is "yes."

Q And it is fair to say that after December 1st you had other conversations with either Mr. Kantor or Mr. Gould or Judge Streit about aspects of the civil settlement in one form or another?

A Correct.

Q And it is also fair to say that during none of those conversations, either late in December or January or February or March or April of 1976, that you ever made any disclosure to them of the fact that you had referred this case for criminal reference -- I'm sorry, for criminal prosecution -- to the United States Attorney's office for this district; is that correct?

A That is correct.

Q Now I think there has been testimony about a conversation that occurred in May of 1976 with you and Mr. Kantor; is that correct?

A Correct.

Q And that is the first conversation in which Mr. Kantor spoke with you, after he was notified for the first time that the United States Attorney was getting involved in this matter; is that correct?

A Correct.

Q And is it fair to say that Mr. Kantor, either through responses you made to him or statements he made to you, was of the impression or stated the impression that the matter had not been sent over by you to the U. S. Attorney's office but that the U. S. Attorney's Office had gotten into it on its own?

A No.

Q Is it fair to say, then, that Mr. Kantor

Q And he didn't know that, did he?

A I had no reason to believe that he knew that.

Q So you made no attempt to acquaint Mr. Kantor with the full and complete truth?

A He never asked me. He never asked me how the matter came to their attention and I never told him.

Q So it is your testimony that Mr. Kantor's statement to you as testified in this record, and I won't repeat it, imposed no obligation, ethically, legally or morally upon you, Jeffrey Tucker, to inform Mr. Kantor of the full and complete facts?

A None whatsoever.

Q Do you agree with this statement, Mr. Tucker, about negotiations of SEC cases, that adequate disclosure doesn't take place when there are salient facts bearing on the merits of a negotiated settlement not disclosed?

MR. CUTNER: May we know what Mr. Naftalis is reading from.

THE COURT: I don't think he needs to identify it in advance.

THE WITNESS: Would you read that back?

(Record read.)

A Yes.

MR.NAFTALIS: Excuse me one second.

A I would think so, yes.

Q And you would have to show, would you not, in addition that not only had a violation occurred but there was a reasonable likelihood of future violations occurring or else you would not have been entitled to an injunction; is that correct?

A Correct.

Q And as a matter of fact, isn't it fair to say that often -- well, let me strike the word "often" -- that there are times when the SEC goes to court in the Southern District of New York, where they prove a violation but are denied injunctive relief because the Court holds and finds that there is not a reasonable likelihood of recurrence; isn't that correct?

A There are those occasions.

Q And you have personal knowledge of some of those situations?

A Yes, I do.

Q Now, Mr. Davis, of course, became obliged, did he not, to pay this large sum of money to the corporation along with Mr. Fields and Mr. Friedman, is that correct?

A Correct.

Q And in addition he gave up his right, did he not, forever to practice law before the Securities and

Exchange Commission?

A He resigned from practice before the Commission without any time period fixed in the resignation for him to resume practice before the Commission. I think that an application would be entertained at any time, and so I wouldn't say that he was irrevocably forfeiting his right to practice law before the Commission.

Q There is no question but that Mr. Davis gave up his right to practice forever before the SEC, in accordance with this settlement -- it was [illegible] unconditional resignation pursuant to Rule 2(e) that was asked for and was given up by Mr. Davis; is that not a fact?

A That is correct.

Q I think you testified earlier that Mr. Davis was a Securities lawyer -- he was referred to in your conversations with Mr. Gould and Mr. Moran; is that correct?

A Yes.

Q And he was referred to in that meeting, was he not, as one of the bright, up-and-coming lawyers in the Securities Bar, wasn't he?

A Yes.

(Continued on next page.)

Q So I take it it is fair to say for him to submit an unconditional resignation from the practice of law from the SEC, it is a substantial sanction for a bright and up and coming member of the SEC bar?

MR. CUTNER: Objection. Argumentative.

THE COURT: Yes. I will sustain the objection.

Q In your opinion, under the facts of this case, that is a substantial sanction is it not?

MR. CUTNER: Objection.

THE COURT: We have had testimony from the witnesses as to how the settlement should be rated on various scales. I will permit it.

A It is a hard question to answer. My understanding was at the time of Mr. Davis' resignation that he had ceased practicing law, so to characterize it as substantial at that time, it's difficult. To one who endeavored to continue practicing, I would have to say it was a substantial sanction.

Q If someone said to you, Mr. Tucker, beginning tomorrow if you couldn't practice before the SEC for the rest of your life, you would regard that as a pretty substantial sanction?

A Yes.

Q Mr.Tucker, can you tell us what to your knowledge

Mr. Davis got out of the settlement by settling, other than an end to the litigation on the civil side, in exchange for giving up all these various things we have heard about?

A I assume he saved himself the cost of litigating which I think would have been an absolutely fruitless effort on his part.

Q Of course he has the expense of litigating here --

MR. CUTNER: Can he answer the question?

THE COURT: Yes.

A In my view he would have been unable to litigate the matter successfully. I don't believe any of the facts could have possibly been disputed.

Q What did he get --

MR. CUTNER: Can he finish the answer?

THE COURT: The answer was then verging into the non-responsive.

Q Can you tell me what affirmative benefits, if any -- you testified about things, that there was negotiations involving who was on the board of the corporation, whether there would be special counsel and the like.

A Correct.

Q None of that affected Mr. Davis?

A No.

Q Can you tell us what if any affirmative benefits Mr. Davis received as the result of consenting to a settlement in which he agreed to pay $435,000 along with Fields and Friedman which he never received, agreed to give up his right to practice law forever before the SEC as well as consenting to broad injunctive relief?

What affirmative benefits did he get?

A He avoided a trial which could have included a factual finding of what went on here as opposed to simply allegations by the Commission, and I believe an evidentiary hearing or a trial on the merits could well inure to his detriment considerably.

Q Other than avoiding a trial, did he gain any benefit?

A I don't know of any.

Q He wasn't allowed to be an officer, a director of the corporation, was he, as the result of the settlement?

A He never was to begin with.

Q And that was nothing he was bargaining about, was it?

A No.

Q Mr. Tucker, I want to ask you something else.

Is it not a fact had the defendants in this

A Yes.

Q Mr.Tucker, before you spoke to Mr. Wing, did you get anyone's consent, permission or authority to speak to Mr. Wing or to refer this matter or bring it to his attention, prior to speaking to him?

A I think I had discussed that we should bring this matter to the attention of the United States Attorney's office with Mr. Malowsky. Certainly I discussed it with him as that call was coming in from Mr. Wing. I told him about TDA. I don't know whether I ever discussed it with Mr.Moran. I am not certain that I discussed it with Mr. Moran. I am sure I discussed it with Mr. Malowsky.

Q Was there anybody else at the SEC whose authority or consent you requested before you spoke to Mr. Wing about the TDA matter, other than Mr. Malowsky and possibly Mr. Moran?

A No.

Q I take it, therefore, that at no time did you seek any consent or permission from anyone in the Enforcement Division in Washington, is that correct?

MR. CUTNER: Your Honor, I object because the question is assuming such authority, . or implies that such authority is needed or should be asked for.

I think we ought to establish that foundation

A Yes.

Q And you learned, Mr. Tucker, from your very earliest days at the Commission that the "Commission" means the five Commissioners acting as the Securities and Exchange Commission of the United States?

A Correct.

Q And as a matter of fact, in this case you sought Commission approval when you asked for the order of investigation, did you not?

A Correct.

Q And that is part of the A10, which I think you have already identified?

A Correct.

Q And you sought Commission approval when you wanted to sue people civilly, did you not?

A Correct.

Q And you sought Commission approval when you sought to settle the case against a defendant?

A That is correct.

Q Now in that connection I show you a January 27th piece of the A10 file, which Mr. Bender tells me is Defendant's Exhibit M, and which I ask you, Mr. Tucker, in fact is that the authority from the Commission to settle with some of the defendants?

A This is the minute --

Q Of the Commission?

A -- of the Commission authorizing us to enter into a settlement.

Q With which defendant?

A The defendants TDA Industries, Inc., Douglas P. Fields, Frederick M. Friedman, Peter S. Davis, Westcalind Corp. and Eric Berge.

Q I have not been able to find the Sandberg one. I trust, Mr. Tucker, it is not for the reason that the Commission may have regarded us the same way you did in your notes. Did you ever find the Sandberg authority for settlement?

A No, there isn't any. Mr. Sandberg consented to the relief we sought in the initial complaint. Consequently, there was no requirement that we obtain Commission approval to enter into the settlement.

Q Now I notice also on that authority that there are certain names, is that right?

A Yes.

Q I was wondering if you would come with me, Mr. Tucker, at least for a few minutes now at the end of my examination, and identify some people for his Honor.

You have already told us about Mr. Malowsky.

Q You mean you know of some authority that the Commission has delegated to you in writing, as a seven-year staff member, to make that determination on your own?

A There is no authority in writing to make that determination.

Q Mr. Tucker, when you first got to the staff of the Commission, did you ever hear of a criminal reference report?

A Yes.

Q Did you ever write one, Mr. Tucker?

A No.

Q Did you ever know anyone at the staff who wrote one?

A Yes.

Q And that criminal reference report was supposed to go first to the Regional Administrator, isn't that right?

A Correct.

Q And then to the Assistant Director in Washington?

A Correct.

Q And then to the Office of Criminal Reference and Special Proceedings?

A Correct.

Q And then to the Associate Director of Enforcement, in principle, no consent decrees were signed. Certainly they hadn't been filed with the Court and it was entirely possible, in my opinion, that Mr. Wing would have had an Assistant available who might have started working on the case on December 2nd, in which case Mr.Gould, Judge Streit and Mr. Kantor would have known about this matter long before the settlement, certainly long before it would have been submitted to the Court for signature.

So, my calling Mr. Wing on December 1st has nothing to do with the settlement. My view is it was unrelated to the settlement discussions after September 4th.

THE COURT: As a practical matter, Mr.Tucker, if before signing these consents these defendants had known that there had been a criminal reference and that there was, in consequence, a possibility, or indeed, if the case is as severe as you suggest to me the likelihood there would be an indictment in a criminal trial, why on earth would Fields and Friedman and Davis put over half a million dollars into the company? Why wouldn't they just keep it in order -- for if no other reason -- to pay defense counsel on the trial? Why would Mr.Davis renounce his right to practice before the SEC voluntarily? Why wouldn't he go on practicing as long as he could? Why would these gentlemen step down as directors if they knew that the chances were that they were going to be participating as defendants in a criminal trial, why would they do all of these things?

THE WITNESS: Judge, I think they believed that there would be no criminal case growing out of this and that is why they entered into a consent decree.

THE COURT: What do you think they based that belief upon?

THE WITNESS: Nobody asked me. Neither Mr. Gould, Judge Streit, Mr. Kantor, Mr. Ostrow, all the counsel involved in this case, all they had to do was ask me is the case going to be a criminal case and they would have had an answer. It is as simple as that and with all due deference to Mr. Gould, somebody with that much experience should have asked me.

It is too important a matter to leave to simply inferences and assumptions and what you think is going to be the position of the Commission, and I never gave him any reason to believe that this matter wouldn't be brought to the attention of the U. S.Attorney. Indeed, Mr. Gould being an experienced attorney when I told him on September 4th no deal on criminal, had to be a signal to him that there was a possibility of a criminal prosecution here. Whether he felt by entering into a settlement which he considered to be a very favorable one for the Commission that it would not happen, I have to assume that was his feeling, but certainly other counsel have brought it to our attention, have raised it outright, very explicitly, and we have discussed the matter. That is the way I operate and that is the way certainly the people that work for me should operate, and I hope that they do, and I try to get them to operate in that manner.

THE COURT: All right.

I ran amuck, Mr.Cutner, I apologize.

MR. BENDER: Your Honor, is this a good time for our morning recess?

MR. CUTNER: Could I put one more question before the recess?

THE COURT: Yes.

Q Mr.Tucker, the Court was just asking you about your view of the impact of a disclosure about a criminal reference, the impact of such a disclosure on the civil case. Can you tell us your view of the impact of such disclosure on the criminal case? Would it have an effect on the bringing of an indictment?

MR. FRANKEL: Objection. This seems to me to ask first of all for a conclusion of law, which is your Honor's provicne, and second of all, I don't know

AFTERNOON SESSION

2:15 p.m.

JEFFREY TUCKER, resumed.

MR. CUTNER: Your Honor, on the matter that we were addressing before lunch, I fear that I may have understated our position on it.

I think that the Government's position would be that not only was the Zammas-Fields-Georges' price manipulation not disclosed to the SEC, but that during the course of the SEC's investigation the SEC had or developed some suspicions regarding the stock purchases prior to the November 10th, 1971 offering, and made inquiries of at least Mr. Kantor about those purchases.

So that not only did the defendants not come forward with the information but even if asked the information was not forthcoming, and I earnestly submit to your Honor that it has a very direct bearing on the fairness issue that has been raised in this hearing.

THE COURT: Just so that I can be oriented, can you, by means of the indictment and the specific acts spelled out in the indictment, identify for me the precise acts which you say were not revealed by the defendants to the SEC during the course of the negotiations which culminated in the consent judgments?

MR. CUTNER: Well, paragraph 10(a) applies

Q Mr. Cutner asked you certain questions concerning the substance of and compliance with the consent decrees in this case.

Is there any respect in which any defendant in this case, as of this moment, has failed to comply with any provision of any of the consent decrees?

A No.

Q With reference to the monies which Fields, Friedman and Davis agreed to pay on account of the ERD transactions -- those two transactions -- you stated in response to Mr. Cutner's questioning that there was or perhaps still is an action pending against Mr. Schoenbrum or his law firm; is that correct?

A Correct.

Q Did you mean to suggest to the Court that in your opinion there is any reasonable possibility of collecting any of the monies that went into Schoenbrun's pocket?

MR. CUTNER: I object, your Honor.

Q Let me rephrase it, then.

Isn't it a fact that your own investigation shows that Schoenbrun had dissipated all of the monies that went into his pocket, with the exception of the $72,000?

A Our information in that regard was a representation by Mr. Driscoll of the District Attorney's Office that

Q Did you understand as counsel for the corporation they had a significant interest in not having the two principals of the corporation criminally prosecuted?

A I am sure they had that interest, yes.

Q Did you perceive them as among the primary objectives -- about the SEC not making a criminal reference in this case?

A Their objectives were irrelevant to a criminal reference.

Q That is not what I asked you.

Did you ever perceive either of them as being remotedly concerned with the possibility of there being a criminal reference? Did it cross your mind?

A That they were -- of course it crossed my mind.

Q On January 14th when Mr. Kantor came in with Mr. Gould, you testified you perceived that Mr. Gould had as one of his objectives, one of his primary objectives, avoiding a criminal reference.

A Right.

Q Did you perceive the same objective with Mr. Kantor on January 14th?

A No, because there was no reason to even consider the subject with regard to Mr. Kantor. He couldn't presumably were acting on advice of counsel.

Q Did you think that on or about the time that you received the consent decrees signed by Mr.Gould's clients?

A That he felt that by entering into these decrees there would be no criminal reference?

Q Correct.

A Obviously it's possible, yes.

Q I am not asking about possibilities.

A Mr.Frankel, you are, in a matter of hindsight, looking back on why they entered into consent decrees. It appears it was for that reason. At the time they actually entered into the consent decrees, I am really not certain whether he felt that by entering into them at that time that he would avoid a criminal reference.

Q Did it cross your mind that any of the lawyers for the defendants were suggesting to their clients that they favorably considred the terms of this consent decree because by doing so, they had a good chance of avoiding a criminal reference? Did that cross your mind?

A Yes.

Q When? Did it cross your mind at about the time you got the consent decrees back signed?

A I would imagine so, yes.

Q Is that your best recollection?

A Yes.

Q Did it cross your mind in the correspondence that you had with them after that, that the reason they had returned those consent decrees with signatures of their clients was because they thought there was a good likelihood they could avoid a criminal reference at that time?

A I have no recollection of it crossing my mind.

Q At the time it did cross your mind when you got back the signed consent decrees, did it cross your mind that there was an issue, a material issue that might be helpful to them in assessing whether to go through with these consents? Did that cross your mind?

A No.

Q Did you think that the issue of a criminal reference was material to the defendants and their attorneys?

A The issue was definitely material.

Q Did you know it to be material when you got back the consent decrees signed?

A Yes.

Q Did you know that they were operating under a misapprehension as to a material fact, to wit, that the case was already in the U. S.Attorney's office, or in the U.S.Attorney's office's attention?

A No.

Q Which of the propositions in that last question did you not know to be the fact?

A I didn't know that they were laboring under a misapprehension.

Q You mean you thought they knew that the case was in the U.S.Attorney's office?

A May I answer this way: When I told Mr.Gould on September 4th there was no deal on criminal and having not discussed it with him from September 4th through the date that those consent decrees were signed, I felt that we had not withheld any material fact or there was any material fact that was left unaddressed in our settlement.

Q You didn't tell him on September 4th there was going to be a criminal reference, did you?

A No.

Q You just told him according to what you say you told him, that there is no deal on it?

A Correct.

Q Didn't you perceive that he still had as his objective and the defendants still had as their objectives, after September 4, entering into a consent decree which as a matter of fact, would avoid a criminal reference?

A Yes.

(Recess.)

MR. OSTROW: Your Honor, we can proceed in Mr. Naftalis' absence for a few moments.

THE COURT: Yes, I know he is engaged on the phone and I would like to keep on going. Here he is. The question is mooted.

BY MR. CUTNER:

Q Mr. Malawsky, returning to the TDA case, I think my question was when for the first time did you learn of TDA Industries?

A This would have been in January of 1975. The exact date was January 14.

Q What happened on January 14?

A There was a meeting in Mr. Moran's office, Mr. Moran being the regional administrator of the New York office for the SEC. At the meeting was Mr. Moran, myself, Jeffrey Tucker, Bill Nortman of the staff, Mr.Gould was there, Mr. Kantor. This was in the afternoon of January 14.

Mr. Gould had called Mr. Moran earlier and an appointment was made. Mr. Gould appeared and proceeded to tell us, the staff, about a situation involving TDA and certain of its officers.

Q As best as you can, tell us what Mr.Gould said.

MS. GOLD: The Government calls John Wing.

JOHN R. WING, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. GOLD:

Q Mr. Wing, can you tell us where you are employed?

A The United States Attorney's office for the Southern District of New York.

Q What capacity?

A I am an Assistant United States Attorney.

Q What is your position in the United States Attorney's office?

A Chief of the Fraud Unit.

Q For how long have you held that position?

A Since approximately June 1971.

Q How long have you been an Assistant United States Attorney?

A Approximately ten years.

Q I direct your attention to December of 1975. Did you become aware of a case called TDA Industries at that time?

A Yes.

Q Can you recall how that came about?

A I don't recall exactly how I became aware of it, but I believe it was by a phone call or a conversation with either Don Malawsky or Jeff Tucker advising me of the existence of a case which they thought would be a good criminal case.

MR. BENDER: Can we have that answer read back.

THE COURT: Yes.

(Answer read.)

Q I show you Defendants' Exhibit M in evidence, a letter addressed to you and dated December 1, 1975.

Did you receive that letter?

A I did.

Q Is that a copy of a letter you received?

A Yes.

Q Does it refresh your recollection as to who you spoke to about the TDA case?

A It indicates it was with Jeff Tucker.

Q Did you subsequently --

MR. BENDER: I would object to that, your Honor.

THE COURT: Is your recollection refreshed by that letter?

THE WITNESS: It isn't precisely. I just don't recall who I spoke to, but I assume this letter is correct.

A I think that is the correct interpretation of that whole phrase.

Q Did you have anything to do with the discussions about someone here having some concern that there might be something inappropriate about having the information you had without Commission authority?

A I don't think so.

Q You did not participate in those discussions?

A I don't know that such discussions took place.

Q I didn't ask you that. I asked you whether or not you participated in any discussions that were had here having to do with whether or not authority is needed for the file.

A Discussions about whether authority is needed?

Q Yes, required, statutorily authorized or whatever.

A Well, the answer is maybe yes, if I am interpreting your question correctly. We talked about the fact when I looked through for the letter, I couldn't find the letter. Then I found out from Mr. Cutner that there hadn't been a Commission order, no doubt because my letter hadn't gone over and theSEC in New York hadn't sent it down to Washington to get the approval. That is the reason for the letter.

discuss it. I mentioned a TDA case to Mr. Wing -- periodically, I think, on a couple of occasions in the fall or early winter of '75.

THE COURT: All right. We have a mention of it but not a discussion.

Back to you, Miss Gold.

BY MS. GOLD:

Q Going back to the time when you first heard about the case from Mr. Perlmutter, did you discuss the case with Mr. Perlmutter?

A He mentioned the case to me and I suppose my responding would be a discussion -- the answer would be "yes."

MR. BENDER: Your Honor, could we have the conversation?

THE COURT: What did he say?

THE WITNESS: I don't recall the exact words, your Honor. The substance of the conversation with Mr. Perlmutter, I believe on several occasions in the fall of '71, were brief telephone conversations with --

THE COURT: The fall of --

THE WITNESS: '75 -- forgive me, your Honor -- brief telephone conversations where we would be talking perhaps about other matters, including a case called Jerome

Mackey's Judo, Inc., which Mr. Perlmutter had at the SEC and which I was preparing for trial before Judge Weinfeld.

During the course of the conversation about Jerome Mackey's Judo, Mr. Perlmutter mentioned TDA and said, in substance, "We have got a terrific case here. We want to send it over to you" or "It's coming over to you. It's a fraud." And my response would be, "I'll talk it over with Rusty if I get a chance" -- that's John Wing.

THE COURT: Will you repeat that answer, please.

(Answer read by the reporter.)

THE COURT: Fix the time of those conversations for me as best you can, Mr. Sorkin.

THE WITNESS: Yes, your Honor. I can only tell you that the trial before Judge Weinfeld started December 9th --

THE COURT: December 9th?

THE WITNESS: December 9, 1975. It would have to have been before that, because I was locked in in preparation for that trial, and my best estimate -- guestimate -- would be Octoberish, Novemberish.

That is the best I can do, your Honor.

THE COURT: All right.

THE WITNESS: I mean, I was on the phone all

Q I hate to do this to you -- is half a dozen a reasonably accurate figure?

A I can only answer you by saying we had a number of calls -- more than perhaps half a dozen, but we were talking principally about Jerome Mackey's Judo, because he was the staff attorney on that, and that then he would say as an aside, "We want to really get DTA. Push it over. Get it going."

And my answer was that nobody could do it, and so that ended it.

I can't tell you -- I don't recall any specific calls on TDA alone, but just in conversation with him about evidence and SEC investigatory transcripts and everything else, TDA may have come up in half a dozen calls or three calls -- I don't remember -- two calls, six calls -- I really don't remember.

Q Can you say that the first call -- I take it you don't know exactly the date that that first call on TDA came?

A Oh, no. It was the Fall of '75, and it could have been earlier.

Q It could have been before?

A Yes, it could have been the summer. It could have been the late summer.

when Mr. Thomas Doonan, a criminal investigator on the staff, began the investigation, then I believe I saw Mr. Davis in '75, again in his capacity as solely a witness, because he had been counsel to the company or the underwriters.

Q But he was a normal witness called by you in an action brought by the United States?

A Rarely, Mr. Naftalis, have I ever had normal witnesses --

Q Let's call him abnormal, then.

A I think I know which way you are going in your question and I can say to you that Mr.Davis had nothing whatsoever to do with any aspect of the criminal prosecution of Jerome Mackey's Judo Schools.

Q I think you testified a little bit earlier also that in the fall, somewhere around October or so or maybe earlier --

A Of '75.

Q Yes. -- you had some conversations with a man by the name of Stewart Perlmutter, a staff attorney at the Securities and Exchange Commission.

A That is right.

Q During a number of these conversations, however many there were, Mr. Perlmutter indicated to you that the

United States Attorneyrs office ought to be interested in a case that the SEC was involved with called TDA Industries.

A That is correct.

Q I think you testified in response to one of his Honor's questions that Mr. Perlmutter described the case with zest and enthusiasm or some other similar manner, is that correct?

A Yes.

Q During the course of one or more of these discussions that occurred at or about the fall of 1975, didn't Mr. Perlmutter indicate to you that the sending of the matter over to the U. S.Attorney's office would have to wait until the SEC had finished it up or wrapped it up?

A In substance --

Q Is that accurate?

A In one or more of the conversations, he said to me -- I know I always said, when are you going to be done or when is it going to come over and this was not only to Mr. Perlmutter, but everybody that called me, and I don't recall giving him a date, but I do recall saying we are going to wrap it up as soon as we can, finish it up, finish up the case, or words to that effect, then we will get it over to you as soon as possible.

THE COURT: Mr. Perlmutter said that?

THE WITNESS: Yes.

MR. NAFTALIS: Nothing else, your Honor.

CROSS-EXAMINATION

BY MR. OSTROW:

Q Mr. Sorkin, I hate to bring you back to 1971 again, but forgive me if I do that.

Do you recall that it is your testimony that about from the beginning of the BRand, Grumet & Siegel case, you had it in your mind that it would be an appropriate case to go criminal?

A I take issue only with beginning of the case. From the beginning of the time that I understood the significance of Section 9(a)(1) and 9(a)(2) of the Exchange Act, the manipulation section of a listed securitiy, and I understood the dimensions of this case. Whenever that time was, and I would think it was around early spring, 1969, the answer is yes, I thought right there this should be a criminal case.

Q And that thought began some time in 1970 or 1971?

A No, earlier than that.

Q Earlier than that?

A I was always of the opinion well before the investigation was completed that this case probably warranted but in civil actions, yes.

Q And Mr. Malawsky would permit that, and Mr. Moran would permit that, and even Stanley Sporkin permits that, does he not?

A Yes, even Stanley Sporkin.

Q Would you tell me, Mr. Sorkin, how in the world any defense counsel in this case --

A Brand, Grumet?

Q No, in TDA -- could have attempted to persuade Perlmutter from calling you about the reference if they didn't know about it?

A I can answer this way, Mr. Ostrow, the time for a defense lawyer in my experience to come in and talk is to the U. S. Attorney and not to an SEC staff member --

Q Mr. Sorkin, I appreciate what you are trying to do --

MS. GOLD: Excuse me, your Honor --

THE COURT: No, it was not responsive. It was not coming out responsive.

MR. OSTROW: Perhaps I will put it in a different way.

Q Mr. Sorkin, when you were called by Perlmutter, you did not say to Perlmutter, "Have you called the defense lawyers? Do they know you are calling me?"?

A I did not.

Q Did Perlmutter volunteer to you that he had called the defense lawyers and said "I am about to call Sorkin. I would like you to try to talk me out of it"?

A No, never said anything of the sort.

Q Did you ever suggest that to him?

A That he call defense lawyers?

Q Yes.

A No.

MR. OSTROW: I have nothing further.

THE COURT: Miss Sweeney?

MISS SWEENEY: No questions.

THE COURT: Redirect, Miss Gold.

MS. GOLD: Yes, Judge.

REDIRECT EXAMINATION

xxx BY MS. GOLD:

Q You said you had a conversation with Mr. Perlmutter in which he said something to the effect that he would send the TDA matter over and then get this wrapped up, or some such thing?

MR. BENDER: Your Honor, may we have the -- I will object to the form of the question.

THE COURT: Because you think it is not an accurate paraphrase?

MR. BENDER: Yes.

THE COURT: I think we ought to have the whole conversation if Miss Gold is going to go into it rather than characterizing it.

MS. GOLD: Well, it is in the record. I don't mean to characterize it, just to remind him that he gave certain testimony with respect to this conversation.

THE COURT: Do you remember that?

THE WITNESS: Yes, I do.

THE COURT: Okay, he remembers that.

Q Could you tell us what you understood to mean by whatever the record reflects the conversation was?

A I understood that I -- well, in some cases I understood that to mean finish their investigation.

MR. BENDER: I object to that.

THE COURT: Yes.

THE WITNESS: I can't answer the question, your Honor. I don't think I formed -- finish -- I can only answer this way: Finish the case, finish whatever they were doing, but I did not know what they were doing.

THE COURT: I see.

THE WITNESS: Finish whatever they were doing -- whatever the SEC were doing at the time, they were going to finish up, be it an investigation, a settlement, administrative proceeding, an injunctive action -- whatever they were doing from their standpoint, finish it up, and then come over to the U. S. Attorney.

THE COURT: But you don't recall that Mr. Perlmutter told you in this discussion what they were doing?

THE WITNESS: No, your Honor. Finish up the case, that is all.

THE COURT: I see.

Q You also testified -- and anyone can correct me if I am stating it inaccurately -- that you were not free at the time of that conversation to take the case.

A Me, personally?

Q Or the office was busy and you personally ~~was~~ were busy.

A I was personally busy, and my conversations with Mr. Wing were that there was just nobody in the unit who could take the case.

Q But if either you personally had been free, or your conversations with Mr. Wing had revealed that there were personnel available to handle the case, would you have given a different response to Mr. Perlmutter at that time?

A I can only answer that by saying, depending upon the status of the case -- would I take it if the statute of limitations was running --

Q If you know.

A Well, it depends on what you mean by "reference." I believe our staff did have conversations with the U. S. Attorney's office with reference to the case.

Q To your knowledge, or were you told about it?

A I was told about it. I did not -- I do not recall any conversation.

Q And who told you about it?

A I believe Mr. Tucker.

Q And do you recall about when you had this conversation with Mr. Tucker, when he told you this?

A I would say the spring or summer of 1976.

Q Prior to that had you any knowledge whatever that there had been-- that this case had been called to the attention of the United States Attorney's office?

A Not that I can recall.

MR. BENDER: Excuse me one moment, your Honor.

(Mr. Bender confers with Mr. Frankel off the record.)

MR. BENDER: Can I have Defendant's Exhibit M, please?

MR. FRANKEL: This is it (handing).

MR. BENDER: Oh, excuse me.

Q In, I think you said April -- what was it, April or May of 1976, that you learned of that fact from Mr. Tucker?

A Well, I think I said the spring or summer.

Q The spring; and in what form did your information take -- that is, was it in conversation with Mr. Tucker or did you receive any copy of correspondence which reflected that fact? What form, is your best recollection?

A My best recollection is that Mr. Tucker informed me that there were conversations with the U. S. Attorney's Office, the U. S. Attorney's Office was interested in the case and would be pursuing it.

Q Did you subsequently receive any copy of any correspondence or any letter that went out from the SEC with respect to calling it to the attention of the U. S. Attorney?

A Not that I can recall, no.

Q Do you recall ever receiving it before then?

A No.

Q I show you a copy of a letter dated December 1, 1975, which appears in Defendant's Exhibit M for identification --

THE COURT: In evidence, actuall, I believe.

MR. BENDER: Oh, I guess it is in evidence. May we have this changed?

THE CLERK: Yes.

MR. BENDER: I am sorry.

(Clerk marks.)

MR. BENDER: Thank you.

THE CLERK: You are welcome.

(Record read by the reporter.)

Q (Cont'g) -- which is a letter to John Wing, which has been identified by Mr. Tucker as a letter he wrote under date of December 1, 1975 to "Dear Rusty," calling the attention of this case to him, sending him copies of the pleadings, and on the bottom apparently there was a blind copy sent to you, is that right? At least it so indicates.

A (After examining) It so indicates, yes.

Q You have no recollection of ever receiving a copy of that letter?

A No, I don't.

Q Do you know who typed that, "Messrs. Moran, Marawsky, Perlmutter, D. Jacobs, Pernik"?

A Well, I don't know but I assume it was Mr. Tucker's secretary.

Q By the way, who is D. Jacobs?

A That is Douglas Jacobs and he is a chief attorney in our office.

Q Mr. Malawsky, I take it it is fair to say you engaged in a number of settlement discussions or have over the years, is that correct?

A Yes.

Q Involving all sorts of litigated matters before the Commission?

A That is correct.

Q In dealing with people who come in representing individuals and corporations before the Commission, I take it that you expect them to speak with you with a fair degree of candor and honesty and not be dishonest with respect to the representations they make to the Commission?

A That is correct.

Q I take it you would impose the same obligation upon yourself and other members of the staff to speak with the same degree of candor and honesty and not mislead people when they speak to private counsel?

A That is correct.

Q I take it, Mr. Malawsky, in which you have had in the past -- you weren't involved in these negotiations, involving TDA?

A That is correct.

Q In terms of your own general practices, in the negotiations you have had in the past, I take it you made sure when there was the possibility that someone may be misled, to tryto make sure they wouldn't be during the course of the negotiations?

A I certainly made every effort, yes.

Q I take it you would expect the same degree of fairness and candor from people sitting across the table, that they not disabuse you of wrong assumptions that may be floating around during the course of your conversations?

A I expect it, but it's not always the case.

Q It is fair to say in the past during your negotiations you have had with people in cases when it is manifested to you that they were under incorrect assumptions what was going to happen or not going to happen in connection with the settlement, you would make sure that they understood the accurate facts?

A Yes, that is correct.

Q I think you indicated earlier on your direct examination that you had never had a conversation with Mr. Gould yourself about the subject of a criminal case or criminal reference of any matter he was involved in, but you have had discussions withother members of his firm on those sorts of subjects, is that correct?

A Yes.

individuals that ran the company, and that it was vital that they be able to stay in their capacities as directors and officers.

MR. BENDER: May we inquire whether that is the same meeting that he is discussing this, or at another meeting?

THE COURT: What?

MR. BENDER: This conversation.

THE COURT: Oh, the same meeting.

Are you still speaking, so far as you recall, as of September 4th?

THE WITNESS: Your Honor, if Mr. Kantor was present at that meeting then it was discussed with Mr. Kantor at that meeting.

If Mr. Kantor was not present at that meeting, then it comes up at a subsequent meeting in which Mr. Kantor made this comment.

Q Mr. Perlmutter, was there any discussion at the September 4, 1975 meeting concerning a possible criminal reference or criminal prosecution?

A There was no discussion of that whatsoever except, as I have said, at some meeting -- I don't recall, be it the February 28th meeting or the subsequent meeting -- Mr. Tucker made the statement that the SEC can make no deal of any kind concerning criminal proceedings, and Mr. Gould said he knew that.

Q . Now directing your attention to September 11, 1975, did you have a three-way conversation with Mr. Gould and Mr. Tucker?

A No, sir.

Q Did you at or about that time have a conversation with Mr. Gould?

A Yes, sir. I had called up Mr. Gould and I had advised him that unless we heard from him on Monday, September 15th at twelve o'clock we were going to commence and file our action.

Mr. Gould told me that -- I'm not sure whether he said he would be unavailable on the 15th or his clients would be unavailable to have a conference on the 15th, could s give him another day to the 16th. I said, "Fine, you have until September 16th at twelve o'clock. If I do not hear from you then we're going to file our complaint."

Q Did you hear from Mr. Gould by noon on September 16th?

A No, sir.

Q What if anything did you do following that day?

A At approximately 12:15, I called up Mr. Gould.

They are received.

xxx (Government Exhibits 23 and 24 were received in evidence.)

Q Mr. Perlmutter, have you seen the indictment in this case?

A I believe I have seen it, but I have not really read it in its entirety.

Q Are you aware of any charge in the indictment concerning a manipulation of the price of TDA stock?

A Am I aware of the manipulation? No, sir, I am not aware of it.

MR. OSTROW: That is not the question.

THE COURT: Read the question back.

(Question read.)

A I have heard there is a charge in the indictment concerning manipulation of the TDA stock.

Q Did there come a time in any of your discussions with any of defense counsel in the SEC case when there was some discussion concerning a manipulation of the price of the TDA stock?

A I did not have any conversation with any defense counsel concerning a manipulation of TDA stock.

MR. BENDER: I object to that as being unresponsive and move to strike it.

THE COURT: My evaluation is, that is responsive.

I will take it.

MR. BENDER: I think the question was, with anyone.

THE COURT: Read the question back.

(Question read.)

MR. BENDER: I withdraw my objection.

THE COURT: All right.

(continued on next page.)

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Q Did there come a time when any of defense counsel disclosed to you, Mr. Perlmutter, that Mr. Fields had been engaged in the manipulation of the price of TDA stock?

A No, sir.

Q Did there come a time when any of defense counsel disclosed to you or mentioned to you the name Thomas Zammas in connection with this case?

A No, sir.

Q Did there come a time when any of defense counsel mentioned to you the name of George Georges in connection with this case?

A No, sir.

Q If you know, Mr. Perlmutter, did any of defense counsel at any time disclose to some other attorney at the SEC that Mr. Fields had been engaged in a manipulation of the price of TDA stock?

A Not that I am aware of, sir.

MR. FRANKEL: Objection, your Honor, on the ground that --

THE COURT: The question is if he knew.

I will take the answer.

A Not that I am aware of.

Q And again, if you know, Mr. Perlmutter, did

Q Did you hear it during the course of your investigation?

A I don't recall that the name was used, Zammas, or that it would have meant something to me.

Q Is it your best recollection that during the course of your investigation you did not hear the name Zammas?

A I don't recall. I know I certainly did not hear it from defense counsel, that I am positive of.

As to whether during the course of the investigation I heard it from someone else, I just don't recall.

Q Is your answer the same with respect to Georges?

A Yes.

Q You are sure you did not hear it from the defendants' lawyers but you may have heard it from someone else?

A I don't recall one way or the other.

Q But you do recall that you did not hear it from the defendants' lawyers.

A That I am absolutely sure of.

Q Did you ever see name in the files during the course of your investigation -- either name, Zammas or Georges?

A I just don't recall.

Q What were your responsibilities with respect to TDA and its officers?

A To conduct an investigation.

Q Into what?

A To determine if there had been any violation of the Federal Securities Laws.

Q Any violations of any type involving any transaction, isn't that correct?

A No, that is not correct.

Q Was it limited to the matters set forth in the indictment, with the except of the Georges-Zammas allegations?

A It was limited as to certain areas of the Federal Securities Laws.

Q What was it limited to?

A As to possible 10(b)(5) violations, and it was mainly the areas of the three transactions -- not that we were limited. We could have broadened the investigation if we had uncovered other information.

Q Wasn't your assignment to investigate, to determine whether any of these defendants or the corporations had committed any violations of any of the Federal Securities Laws?

Wasn't that your assignment?

A Yes.

Q It wasn't limited to the two finder fees transactions and the ERD transaction, was it?

A The formal order of the Commission was so limited.

Q Your assignment.

A My assignment did not speak in terms of what --

Q Your assignment was to investigate as to any violations of any of the Securities laws by any of the defendants in this case or either TDA or Westcalind, isn't that correct?

A I would have to see the assignment in order to answer that question.

Q Well, did you see it before you drafted your affidavit?

A No.

Q Did you state in your affidavit:

"In January 1975 I was assigned to conduct an investigation to determine if TDA Industries, Westcalind Corp., Douglas P. Fields, Frederick M. Friedman, Peter S. Davis, Eric Berge and others had committed any violation of the Federal Securities Laws"?

A Yes.

Q Do you remember putting that in your affidavit?

A Yes.

Q And was that true?

A To the best of my information it was true.

Q You did not ask mr. Cutner, did you, to look at any other documents before you made that statement, did you?

A Correct.

Q And he did not say you can't look at any others, did he?

A No.

Q Is that your best recollection?

A That's my best recollection, yes.

THE COURT: Is that a paragraph that you drafted, or did Mr. Cutner draft it?

THE WITNESS: That was a paragraph that I drafted, your Honor.

Q During your conduct of your assignment, you did investigate other possible violations or the possibilities of other violations of the Federal Securities Laws, other than the two finders' fees and the ERD transaction, did you?

A I did not.

Q Did others, to your knowledge?

A At one point in time Meyer Goldman came to me and he said to me that he believes that there may be a possible stock manipulation in the fall of '71.

I asked Mr. Goldman -- I said to him, "Do you have anything to support that belief?"

He said, "No."

I said -- it is my recollection I told him that he could send out blues -- he could conduct whatever blue sheets, your Honor -- sending out blue sheets, because it is blue -- it is sent out to the broker-dealers to determine what stocks are being bought and sold by various customers. That is one way of determining whether there is any stock manipulation by what is known as the blue sheets. If you see concentrated activity on certain things coming up, there is a possibility that the stock is being manipulated.

So I told Meyer, if he had this feeling that there may have been a stock manipulation, to send out the blue sheets, let me know what he finds out.

Q Was he reporting to you?

A Yes.

Q Where did he fit into the hierarchy, or was he just an investigator?

A He was an investigator -- he is an investigator, and I think he had a title of senior investigator.

Theoretically he is reporting under the Senior Regional Administrator, but the way it works in practice, the investigator works very closely with the branch chief and will be working with the branch chief in connection with the investigation.

Q That was you, right?

A Yes.

Q Would it be a fair characterization to say that he was your leg man?

A Yes.

Q Did you regard or do you regard a stock manipulation as a securities violation?

A Yes.

(Continued on next page.)

Q Would you say it is less serious than kickbacks on finders fees?

A Equally as serious.

Q Would you say it is less serious than the type of transaction we have been referring to or I have been referring to or I have been referring to as the ERD transactior

A Equally as serious.

Q To your knowledge, did Mr. Goldman send out these blue sheets?

A I believe he did.

Q Is there any doubt about it?

A I believe he did.

Q Do you have some doubt in your mind as you testify now as to whether he sent out those blue sheets?

A I do not recall definitely whether he sent it out but knowing Meyer Goldman, I am sure Meyer Goldman sent out those blue sheets.

Q Because --

A Because Meyer Goldman is a good investigator on the staff of the SEC.

Q And thorough?

A He is a good investigator on the SEC staff.

Q And I take it from all of your conversations with him or observations of him, he regards a stock manipulation as serious an offense as you do?

MR. CUTNER: Objection.

THE COURT: Sustained.

Q What else did Mr. Goldman do, to your knowledge?

A To my knowledge that was the only area that he had ever brought to my attention as an additional possible violation in addition to the three transactions.

Q Did he later report back to you as to what he had found regarding the manipulation?

A I believe he indicated to me there was nothing definitive one way or the other on it.

Q Did he leave you with the impression that he had interviewed witnesses?

MR. CUTNER: Objection to the question.

THE COURT: Let me hear it again.

Q Did he leave you with the impression that he had interviewed witnesses?

THE COURT: Did he tell you that he interviewed witnesses?

THE WITNESS: I don't think so, your Honor.

Q Did he tell you he had investigated this possibility of a serious violation?

A I believe what he indicated to me is, he made some attempt to find out something, but to no avail.

Q Did he tell you that he had conducted an investigation of this possible violation?

A I have answered that question, Mr.Frankel.

Q Would you deign to do it again?

THE W[illegible]ESS: Would the reporter read back my answer?

MR. FRANKEL: Your Honor, I would ask that Mr. Perlmutter be directed to answer my question.

THE COURT: Let me hear the question.

(Question read.)

THE COURT: Give me your best answer to that.

THE WITNESS: I believe Mr. Goldman told me he had made some sort of inquiry, but to no avail. He had a feeling as an investigator has a feeling, but he was just not able to come to anything definite as to any evidence to support his hunch that there may have been a violation.

THE COURT: A violation taking the form of a manipulation?

THE WITNESS: Yes.

THE COURT: Can you place a time for these conversations with Mr. Goldman, in particular the one you just referred to?

THE WITNESS: I would believe it would be the spring, late spring or early summer of '75, but I am not sure exactly when, your Honor.

Q In any event, it was prior to your sending down to Washington the recommendation or the request to file a complaint which resulted in the SEC's approval on September 4, 1975?

A I believe it was prior to that, yes, sir.

Q Did Mr.Goldman mention the names Georges and Zammas?

A The name Georges doesn't sound familiar to me and I don't believe Mr.Goldman mentioned that. He may have said Zammas to me, but I have no present recollection of it. I just don't recall.

Q Are you saying that there is a possibility in your mind that he mentioned Zammas?

A I just don't recall.

Q Are you differentiating between the mention of Zammas and the mention of Georges as far as you own recollection of what Goldman said to you?

MR. CUTNER: Your Honor, I will object. I don't see the relevance of this line of questioning. Maybe Mr. Frankel can give us an offer of proof.

THE COURT: I can perceive the relevance of possible mention of Georges and Zammas during the SEC's own investigation.

I think these last few questions have been fairly prompted by what sounded to my ear at least, as being a distinction, as far as this witness' recollection is concerned, between the name Georges and the name Zammas.

I will permit Mr.Frankel to pursue the inquiry somewhat further.

I think to the extent of which the SEC heard these names or did anything about them during the course of its own investigation is clearly relevant to certain issues.

Go ahead.

Q Would you like the last question reread?

A Yes.

(Question read.)

A The name Georges, I just have no recollection of that name whatsoever.

THE COURT: Total blank?

THE WITNESS: Yes.

As to Zammas, he may have mentioned it. I just don't recall.

THE COURT: Why do you refer to these two individuals in different terms? My attennae indicate there may be some sort of difference in your recollection or non-recollection. As far as Georges is concerned, total blank. You don't quite saw that as far as the name Zammas is concerned. You don't say total blank. You say it may have been mentioned but you don't remember?

THE WITNESS: Right.

THE COURT: If you don't remember it, why not say total blank as to Zammas too?

THE WITNESS: Because Zammas, for some reason, that name -- in other words, it comes up somewheres in my six years at the Commission. It comes up somewheres in my mind.

THE COURT: A faint bell rings as far as Zammas is concerned?

THE WITNESS: It could be absolutely nothing to do with Meyer Goldman, but the name -- I have heard of the name.

THE COURT: But you are not sure of the context in which you have heard of it?

THE WITNESS: Right.

THE COURT: But as far as Georges, no bells?

THE WITNESS: Right, your Honor.

Q Did you participate in the drafting of the recommendation to Washington for permission to file a complaint and begin settlement negotiations?

A Yes.

Q There is no mention of the manipulation, alleged manipulation?

A There was no alleged manipulation.

Q There was no alleged manipulation. You are saying there was no manipulation alleged --

A We were not alledging a manipulation because we were not aware of a manipulation.

Q You were aware of the possibility of a manipulation, weren't you?

A I was aware that Mr. Goldman had a feeling, yet ye was unable to verify that feeling on what I consider law, he was in a court of law.

Q The first time you heard of this, Mr.Goldman told you in substance that his antennae had perked up at something, is that right?

A Yes.

Q When he told you that, yours did as well, didn't they?

A I told him to conduct his investigation. If he comes up with something, to advise me.

Q That was before the report to Washington was drafted, wasn't it?

A Yes.

Q When you drafted the report to Washington, you had to consider what you were going to put in the report, didn't you?

A Right.

Q Among the things you had to consider were transactions you were going to ask permission to allege in a complaint, is that right?

A That is right.

Q Among the things you had to consider was whether you had enough to allege a manipulation in the complaint, is that right?

A The manipulation was not in my mind because Mr.Goldman never had anything other than a feeling on a manipulation.

Q Mr. Perlmutter, my question is, at the time you drafted that report to Washington, did the thought occur to you that there had been a hint of a possibility of a manipulation?

A I already have said that, that Mr.Goldman had told me --

Q Did that occur to you at the time you were drafting the report?

A It's a non-sequitur. I just can't answer it.

Q I apologize for my inadequacy, but try to answer the question.

Q My question, sir, is did there come a second time? Did he talk to you about it again?

A I believe I had another conversation with Mr. Goldman.

Q Did you have a third conversation with Mr. Goldman about it?

A I don't believe so.

Q About how much time passed between the first conversation and the second conversation?

A I don't recall.

Q Was it a matter of a month or more?

A I don't recall.

Q Was it a matter of a couple of days?

A I just can't recall.

Q That is not true, is it?

A What?

Q That you don't know whether it was a matter of a couple of days?

A I have no recollection of that, Mr. Frankel. I can't possibly give you an answer.

Q You mean it is possible within a matter of a couple of days, Mr. Goldman came back to you for the second time and said to you he couldn't come up with anything?

MR. CUTNER: Objection.

THE COURT: Overruled.

MR. CUTNER: He is asking for speculation.

THE COURT: He is asking for his recollection.

A I do not have a recollection on the period of time.

Q My question is, are you testifying now that your recollection tells you that it is possible that within a matter of days, Goldman came back to you and said there is nothing here?

A I am not saying that, Mr.Frankel. You know I am not saying that.

Q I don't know what you are saying.

Are you saying that is possible or are you saying it is not possible?

A I doubt it was within a few days, but I just don't have a recollection.

Q Why do you doubt it?

A Because if there was a possibility of a manipulation, I would have given Mr.Goldman more time to try to pursue it than just a few days.

Q There was a possibility of a manipulation, wasn't there?

A Mr. Goldman had a feeling there may have been a manipulation.

Q So that meant to you there was a possibility there was a manipulation, didn't it?

A It meant there was a possibility that there was a manipulation. There could have been violations of other Federal securities laws as well. I had no way of knowing that.

Q Thank you.

That meant to you there was a possibility of a manipulation?

A There was a possibility.

Q That meant to you that there had to be an investigation conducted that would take more than a couple of days, didn't it?

A Yes.

Q So when you just testified that it might be a couple of days, you were not testifying accurately, were you?

A I did not say it was a couple of days.

Q Didn't you say --

A I said I had no recollection.

Q You regarded this whole situation as a serious situation, didn't you?

A The alleged manipulation?

Q What was going on at TDA as that information had come in to you, you regarded it as a serious matter?

A Yes.

Q One that should be pursued wherever it led?

A Yes.

Q If there was a crime, you wanted to find it?

A Yes.

Q When Mr.Goldman told you there was a possibility of a manipulation which you regarded as serious, you wanted it found if it could be found, didn't you?

A Yes.

Q Did you convey that to Mr. Goldman?

A I believe I gave him free rein on that if he could come up with evidence to indicate that this was a manipulation.

Q Did you convey to Mr.Goldman that if there was a manipulation, you regarded it as a serious offense?

A I did not put it in those words to Mr. Goldman, nor need I put it into such words to Mr. Goldman.

Q Because he is a competent, thorough,experienced investigator?

A Yes.

Q And you would have perceived that he perceived the seriousness of this type of offense just as you?

A Yes.

Q When he reported back to you the second time, do you recall what he said to you?

A I believe that --

Q Do you recall what he said to you?

A I am trying to answer your question.

Q The answer is you recall it or you don't recall it?

A I have a vague recollection.

Q Did you make any notes?

A No, sir.

Q Did he make any notes?

A I have no idea.

Q Did he submit anything in writing to you?

A No.

(continued on next page.)

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Q Did he tell you what he had done in following this up?

A I believe he had indicated to me that he had sent out the blue sheets.

Q He did tell you that?

A I believe -- I have a vague recollection of this.

Q Well, would you say that your recollection of that is vague enough or precise enough for you to testify here in court in a serious matter that he did tell it to you?

A I have a vague recollection on this, that Mr. Goldman told me that he was unable to come to any definitive conclusions one way or the other.

Q Yes, you told us that.

Did he tell you that he had interviewed witnesses?

A I don't recall.

Q Did you make an assumption that he had interviewed witnesses?

A I don't know exactly what Mr. Goldman did in connection with attempting to establish that there was a possible manipulation.

Q Did you assume that he had interviewed witnesses?

A No, I did not make that assumption.

Q Did you assume that he had done a thorough job?

A I assumed that he did what he thought had to be done.

Q You mean you gave no consideration as to whether or not he had done a thorough job or had not done a thorough job, is that correct?

A I had complete confidence in Mr. Goldman.

Q Did you make an assumption as to whether he had done a thorough job or not?

A I believe he had done a job to the best of his ability.

Q And did you believe that that would have involved speaking with people?

A In a stock manipulation not necessarily speaking to people will prove a stock manipulation, unless you know the right people to speak to.

Q Sir, that is not my question. My question is, did you assume that he was speaking with people?

A Mr. Frankel, again it is a non sequitur. That is not the way a stock manipulation works.

THE COURT: I think that is a fair answer, MR. CUTNER: Objection.

THE COURT: I will take that answer.

A He was upset and he was quite loud on the phone and that is my observation.

Q Did Mr. Gould deal with people above you in this case?

A Yes, sir.

Q Did you resent that?

A Absolutely not.

Q When Mr. Gould expressed his feelings in that telephone conversation, did you resent that?

A I was upset.

Q When Mr. Gould expressed his feelings to you in that phone conversation, did you resent that?

A When you say "resent", I didn't resent. I was upset that an attorney would make such a statement.

Q You immediately ran in to your supervisor, didn't you?

A We told Bill Moran the incident, yes.

Q You ran right away?

A Mr. Tucker came into the office and we then went in to Mr. Moran's office.

Q Mr. Tucker was in the office during the conversation?

A During the latter part of the conversation he came into the office.

Q How much time passed between the time you hung up the phone and went in to Mr. Moran's office?

A Probably no more than a minute.

Q Did Mr. Moran suggest you better put a memo in the file?

A No.

Q Did you think you better put a memo in the file?

A No. Mr. Tucker had suggested that we should have a memo in the file of this conversation.

Q When Mr. Gould's secretary told you that he was out of the office, did it occur to you that he might be at lunch?

A She told me he was due shortly back. As to where he was, I had no dea.

Q Did it occur to you that he might be at lunch?

A It was a possibility.

Q Did it occur to you then, that possibility?

A I don't recall if it occured to me at that time, but it definitely was a possibility.

Q YOu had been dealing with Mr. Gould and other lawyers of the defendants in this action for a period of some seven months?

A Since February of '75, yes.

Q Had they been, to excuse the non-legal word, gentlemanly with you?

A Yes.

Q Courteous with you?

A Courteous.

Q Had they furnished you with documents when you asked for them from time to time?

A Mr. Kantor furnished us with documents from time to time. Mr. Gould, he had his clients take the Fifth and also --

Q Did you resent that he had his clients take the Fifth?

A No.

THE WITNESS: I did not finish the answer to the preceding question.

THE COURT: Go ahead.

A (continuing) -- at the February 28th meeting, Mr. Gould had indicated that his clients would not testify in the matter and that they would take the Fifth. Mr. Tucker had asked to have that confirmed in writing.

We got no response from Mr. Gould in connection with that, then on March 10, Mr. Tucker wrote a letter to Mr.Gould stating that Mr. Gould had made these repre-

Do you recall reading that and signing it in January of 1976?

A Yes, sir.

THE COURT: Is that a document in evidence?

MR. FRANKEL: Yes. That is reading from Exhibit M, a report dated January 13, 1976 at page 5.

Q Did you ever tell Milton Gould that there was going to be a criminal reference in this case?

A No, sir.

Q To your knowledge did anyone at the SEC ever tell that to Milton Gould?

A To my knowledge no one told that to Milton Gould.

Q Did you ever tell Judge Streit there was going to be a criminal reference in this case?

A No, sir.

Q To your knowledge did anyone at the SEC ever tell that to Judge Streit?

A No one to my knowledge.

Q Did you ever tell Mr. Kantor that there was going to be a criminal reference?

A No, sir.

Q To your knowledge did anyone at the SEC ever tell Mr. Kantor --

A Not to my knowledge.

Q -- that there was going to be a criminal reference?

A Not to my knowledge, sir.

Q When did it first come to your attention that there was going to be or that there had been a criminal reference in this case?

A In the fall of 1975.

Q When in the fall?

A I believe it was sometime after the complaint had been filed.

Q Was it in late September?

A I cannot pinpoint it.

Q Did you first learn that there was going to be a criminal reference or that there had been a criminal reference?

A What I had learned was that --

Q On that first occasion, sir, did you first learn that there had been a criminal reference or that there was going to be a criminal reference?

A I was going to answer that question. What I had understood was that the case was going to be brought to the attention of the U. S. Attorney's Office.

Q Who told that to you?

ancillary relief in connection with a civil matter, and as an equitable principle courts examine as to the reasons for issuing an injunction, and equitable principles should come into play; and the Second Circuit, as well as the District Courts here, have said there are many factors in deciding whether an injunction should issue -- such as the nature of the alleged violation, the time period in which the transaction occurred in relation to the time that the Commission is presently bringing its action; as to whether this is a once-in-a-lifetime affair, or whether it is a continuous course of conduct.

Now in the situation we had, we had two 1971 transactions -- the 1971 sham finder's fee, and the 1971 ERD transaction with the TDA stock, and the 1973 sham finder's fee. All three of those transactions were backed up by what I considered, with solid proof, and in this regard as to Mr. Goldman's hunch as to another 1971 transaction, it was my opinion that unless we had some witness to come forward and tell us about it, that Mr. Goldman could spend another year investigating that aspect of the case, and as far as going for an injunction it would probably hurt, especially if nothing came of Mr. Goldman's additional investigation -- it would probably hurt us in going to a court and trying to get injunctive relief when the acts now are further back in time.

In other words, courts have said that they will examine when the violations occurred, and it was my concern that I did not want to have the investigation drag on for maybe another year, and then probably be in no better position than I was when we had originally decided to bring the action.

Also, I may add that in this situation we were asking for a receiver. It was my opinion that a receiver be appointed for this company, and since I felt that we should proceed with a degree of expeditiousness as humanly possible, that we bring the action based on the three transactions; that there was no need -- it would not make a difference so far as the case goes if we had another transaction -- another 1971 transaction as far as -- if the Court would grant the receivership, the three transactions would either do it or not. I do not think an additional transaction would have made a difference.

Q Did there come a time in 1975 when you became aware of any evidence which supported Mr. Goldman's hunch --

A No, sir.

Q -- that there was something wrong, that there was a price manipulation?

A No, sir.

RECROSS-EXAMINATION

BY MR. NAFTALIS:

Q Mr. Perlmutter, on your redirect examination by Mr. Cutner, you testified that it was your opinion that there was no way defense lawyers could not have known this was going to be a criminal case, is that correct?

A Correct.

Q I think it is clear, isn't it, Mr. Perlmutter, you at no time ever told any of the defense counsel in this case that the matter was being referred for criminal prosecution or being sent over to the U. S.Attorney's office for criminal prosecution, is that not a fact?

A That is a fact, sir.

Q I think it is also true that to your knowledge, no one else at the entire Securities and Exchange Commission ever at any time told defense counsel that the case had been or was being referred for criminal prosecution to the United States Attorney's office, is that not a fact also?

A Yes, sir.

Q Mr. Perlmutter, have you ever defended a criminal case?

A No, sir.

Q Have you ever prosecuted a criminal case as a Government prosecutor?

AFTERNOON SESSION

(2:30 P.M.)

STUART PERLMUTTER, resumed.

MR. CUTNER: Your Honor, first it would be a good idea if we asked Mr. Perlmutter to step out.

THE COURT: Would you be so kind, Mr. Perlmutter?

(Whereupon, the witness left the courtroom.)

MR. CUTNER: I hope I can save a few minutes, your Honor, by making this statement:

Over the lunch hour I turned over to Mr. Bender and Mr. Frankel the Commission's investigative file concerning the price manipulation, pursuant to your Honor's instruction.

The file indicates, and I have confirmed with the SEC over the luncheon recess, that the SEC was aware of the fact that Mr. Zammas purchased stock, TDA stock, in November of 1971.

The Commission was also aware that Georges Construction Company had purchased stock in November 1971.

The Commission did not seek to interview either of those persons. I should note, though, that Mr. Zammas was indicted in this district on October 24, 1974 in the case entitled United States v. Aiken, which was a securities fraud case. That case, the trial commenced on July 28, 1975 and ended on August 7, 1975. Judge Motley imposed sentence on Mr. Zammas in that case on September 29, 1975.

I am advised by Mr. Goldman that he was aware that Mr. Zammas was under indictment during the period of the investigation in the TDA case, and for that reason did not seek to contact Mr. Zammas.

He did not seek to contact Mr. Georges either, although Mr. Georges had a reputation as a stock manipulator.

I am not sure if that is going to save us any time here.

The Commission did subpoena all documents, did obtain records from various brokerage houses but did not pursue it beyond that.

I might indicate that there were other -- a number of other areas in which Mr. Goldman and other members of the Commission had hunches as to wrongdoing, and a certain amount of investigation was done as to the wrongdoing in those areas, and those were pursued to a point, but it was decided not to pursue any further the price manipulation scheme, and it was also decided not to pursue the other suspicions.

I might add that apart from the suspicions that were developed, and those were suspicions that arose, I think, because Mr. Zammas and Mr. Georges were known securities violators, but in terms of any proof, there simply wasn't any proof.

I do not know whether Mr. Bender and Mr. Frankel have further examination on Mr. Perlmutter.

THE COURT: He is available, of course.

Well, I am obliged to you for your very prompt compliance with the Court's direction in respect of the investigative file on the manipulation aspect of it. Whether or not that compliance, for which I am grateful, gives rise to further cross-examination of the witness, is for defense counsel to say.

Are you gentlemen ready to proceed?

MR. BENDER: Yes, your Honor, Mr. Frankel is going to proceed with Mr. Perlmutter -- particularly because in view of Mr. Perlmutter's testimony -- some of the documents in this file, which go directly to Mr. Perlmutter's knowledge, may have an impact upon the truthfulness of this witness' testimony yesterday and today.

I would also like to point out that Mr. Cutner's concession with respect to what the Commission knew is rather a skeletal analysis of really what this file reveals. We were shown this file at two o'clock today, and in the short period of time we looked at it it looks like there was quite an extensive investigation in the case, so we would like to go into it with Mr. Perlmutter -- not at length but a little.

THE COURT: Well, I have indicated my view that you are entitled to do just that.

MR. CUTNER: I think I neglected to mention, your Honor, that under an agreement dated September 24, 1975 Mr. Zammas agreed to cooperate with the United States Attorney's Office. There was an agreement signed by Mr. Zammas and John Lowe, an Assistant United States Attorney, and by Mr. Zammas' own counsel.

MR. BENDER: Is that also true about Mr. Georges, or had Mr. Georges been an informant working for the Government prior to that date?

MR. CUTNER: I have nothing to disclose regarding Mr. Georges, and I would also, just in case it is not clear, note my objection to this examination.

THE COURT: That was clear.

MR. CUTNER: Okay.

THE COURT: All right. We can recall Mr. Perlmutter for this purpose.

MR. NAFTALIS: Your Honor, I have to make a phone call, but don't hold the proceedings up.

THE COURT: All right, then let us go ahead.

(Stuart Perlmutter reentered the courtroom, and resumed the stand.)

MR. FRANKEL: With your Honor's permission, may we have this file and its contents marked as, I think it would be, Exhibit AC.

(File and contents marked Defendant Fields' Exhibit AC for identification.) xxx

MR. FRANKEL: Perhaps we can enter into a stipulation. I understand that Exhibit AC constitutes all the records obtained or maintained by the SEC in connection with its investigation of what we have been referring to as the manipulation.

THE COURT: Does the Government accept that characterization?

MR. CUTNER: I have been so advised by the SEC.

THE COURT: Very well.

MR. FRANKEL: We offer it in evidence, your Honor.

THE COURT: Is there objection?

MR. CUTNER: I object on the grounds of relevancy, your Honor.

THE COURT: I will receive it.

(Defendant Fields' Exhibit AC now marked in evidence.) xxx

MR. FRANKEL: Your Honor, the papers in Exhibit AC are -- I don't want to characterize them but there are a number of papers, and in the interest of expedition may I refer to them without individually marking each of them that I am going to refer to -- I will describe them before I ask the question.

THE COURT: Yes, I think that is sufficient.

RECROSS EXAMINATION

xxx BY MR. FRANKEL:

Q Are you familiar with the documents contained in Exhibit AC, Mr. Perlmutter?

A May I see the documents, please?

Q Are you familiar with the SEC's investigative file in this case, on the manipulation aspect of this case?

A No, sir, I am not.

Q Have you ever looked at it?

A I have no recollection of seeing the file. I believe I saw some file that Mr. Cutner showed me up in his office -- that is the first time that I recollect seeing that file.

Q When did you first see the file?

A There was a file that Mr. Cutner showed me. I have no recollection of seeing it prior to this date.

Q Sir, my question is: when did you first see the file.

MR. CUTNER: Can we have the file identified?

THE COURT: Yes. Your first question was: when did he first see the investigative file. I do not know whether he has seen the documents in your hand, Mr. Frankel.

MR. FRANKEL: I understand this is the investigative file.

THE COURT: Quite right.

Have you seen the investigative file?

THE WITNESS: I have -- the documents, if that is the same documents I saw in Mr. Cutner's office, that is the first time. I have no recollection of seeing those documents prior to today, your Honor.

THE COURT: But you really cannot tell whether you have seen them before until you look at them.

THE WITNESS: Well, assuming that is the same documents, then I definitely have no recollection of seeing them before that.

Q When did you see them in Mr. Cutner's office?

A During the recess today.

Q Did you look at all of them?

A Again, the documents -- it was a set of documents -- I looked at them in Mr. Cutner's office.

Q Did you look at all the documents --

MR. CUTNER: Your Honor, I object because I think if you want to have a fair answer here the documents should be shown to Mr. Perlmutter so that we know what he is talking about.

THE COURT: That is true, Mr. Frankel. You cannot clutch that to your chest and ask the witness if he has seen them before.

MR. FRANKEL: But what I am asking the witness is whether he looked at all the documents shown to him by Mr. Cutner.

THE COURT: Did you look at all the documents shown to you by Mr. Cutner?

THE WITNESS: Yes.

THE COURT: All right, he looked at all the documents.

Q Had you ever seen any of those documents before Mr. Cutner showed them to you?

A I don't recall having seen them prior to today.

Q Does that apply with respect to all of the documents or each of the documents that Mr. Cutner showed you?

A Mr. Frankel, if you will let me see the documents, I will go through the documents and --

THE COURT: No, that is not the question. Mr. Cutner showed you certain documents, and the question is, had you seen all the documents that Mr. Cutner showed you for the first time?

THE WITNESS: Right. I don't recall having seen them prior to today.

(Continued on next page.)

Q I show you three pieces of paper that are stapled together, on top of which are printed "U.S. Securities and Exchange Commission, securities transaction questionnaire," name of broker-dealer, Doyle, O'Connor & Company.

Can you identify that for us?

A It appears to be what we call the blues. It must be a Xerox copy and it is white.

THE COURT: The blue sheets that we were talking about before?

THE WITNESS: Right.

Q Does that collection of papers contain any information with respect to the manipulation aspect that we have been talking about?

A This piece of paper contains information as to trades in TDA, on, according to this document, November 4, 1971.

Q What trades does it reflect?

A It reflects purchase and sales transactions through a brokerage firm known as Doyle, O'Connor & Company.

Q I show you four pages which appear to be stapled together with the heading Doyle, O'Connor & Company, and can you tell us what that is?

A It appears to represent transactions between the period November 5, 1971 to November 9, 1971.

Q What is Doyle, O'Connor & Company?

A A broker-dealer.

Q What information does that collection of papers contain with reference to the manipulation aspect of this case?

MR. CUTNER: Your Honor, the documents are now in evidence. They speak for themselves. Mr. Perlmutter has testified, I think, that he hasn't seen them and I don't understand why we are going to have Mr. Perlmutter read what these documents say.

THE COURT: He can briefly characterize or identify what they are. That will be helpful to me.

THE WITNESS: Your Honor, these documents don't tell anyone about the manipulation aspect of the case. What these documents give you, assuming the validity of the documents, to give you transactions that took place.

THE COURT: I think the witness is right in not characterizing them.

Simply tell me what they are and what they show, so I will understand.

THE WITNESS: On the far right-hand corner there is a box called broker-dealer or customer, and it says --it is filled in firm trading, by the company who filled it out.

THE COURT: Which is Doyle --

THE WITNESS: Right. We look on the left-hand side and you have November 5, 1971, bought number of shares, 600. What that indicates is that the firm trading account --

THE COURT: For its own account?

THE WITNESS: As principal, purchased 600 shares and the broker-dealer or customer on the other side of the transaction, in this particular case was California Bank & Trust Company, and similarly going down through it, it is the same. Doyle was buying on November 5 through the firm trading account. Here you have sale out of the firm trading account to the customer, John G. Kinnard & Company.

THE COURT: And the prices for which it was either bought or sold is listed on the column captioned "price"?

THE WITNESS: Yes, and the same is true on the other piece of paper Mr.Frankel handed me.

Q Do you know when the information placed on those pieces of paper was received by the SEC?

A I do not know when.

Q Were any subpoenas issued in connection with any of the information obtained there?

A I would assume that is how the information was obtained.

Q Did you issue any subpoenas?

A I don't believe I issued any subpoenas as to this aspect, as to receiving these blue sheets.

Q Did you issue any subpoenas at all in connection with the transactions in TDA securities in 1971?

A I don't recall my issuing a subpoena.

Q Were you aware whether any subpoenas were issued?

A As I indicated before, I believe Mr. Goldman sent out subpoenas.

Q Were you aware he had issued subpoenas?

A Again, I believe that Mr. Goldman had sent out subpoenas.

Q Sir, my question is, were you aware in 1975 that Mr. Goldman had issued subpoenas in connection with an investigation into what we have been referring to as the manipulation possibility?

A I have no recollection that I had first-hand knowledge of that.

Q Did you hear it from anyone?

A Again I believe from Mr. Goldman.

Q He told you he had issued subpoenas?

A I believe.

Q Do you know a company called Foster & Adams?

A I believe that is a broker-dealer.

Q Is there any doubt in your mind?

A No.

Q Did you have any communications with Foster & Adams in connection with this aspect of the investigation?

A I recall none.

Q Your recall none?

A Yes.

Q I show you a letter dated June 10, 1975, from Foster & Adams to the U. S. Securities and Exchange Commission, attention Mr. Stuart Perlmutter and ask you if that refreshes your recollection?

A I do not recall having seen this document.

Q Have you seen it in Mr. Cutner's office for the first time today?

A Yes, I believe so.

Q What information does that reflect? Does that reflect any information with respect to a Mr. Simon?

A Yes. It reflects information as to Mr. Simon. It also reflects that i do not cross off my name, because I never saw the document.

Q Thank you. I didn't ask you about that, did I?

Did you hear me ask you about that?

THE COURT: You asked if it refreshed his recollection and the witness is saying he never saw it. It is a fair comment within the context of the questioning.

Q Do you know who Mr. Simons was in 1975?

A I believe that Mr. Simon was a former officer of TDA. I am not 100 per cent positive, but I believe there was someone by that name.

Q You heard the name Mr. Simon in 1975, didn't you?

A In other words, I believe, sir --

Q Did you hear the name of Mr. Simon in 1975?

A I believe there was a Mr. Simon who was a former officer of TDA.

Q Does that collection of papers under cover of a letter to you reflect any transactions in TDA in 1975?

THE WITNESS: Could I have that question repeated, please?

(Question read.)

A No, sir.

Q Are you familiar with a company called Torpie & Salzman?

A I saw the name when I was going through the documents in Mr.Cutner's office.

Q Do you know who Torpie & Salzman, Inc., were in 1975?

A The name has absolutely no recollection to me except I saw the name in Mr. Cutner's office.

Q Do you recognize this as being a copy of a subpoena issued by the SEC to Torpie & Salzman in 1975 with various attachments relating to the purchase or sale of TDA securities in 1971?

A Yes, sir, it appears to be a subpoena issued by Mr.Goldman.

Q Does it reflect on the attachments, any transactions in TDA securities in 1971?

A Yes, sir.

Q In November of 1971?

A Yes, sir.

Q Was that subpoena issued by Mr. Goldman, can you tell by looking at it?

A It appears to have his signature.

Q Did he speak with you about that before it was issued?

A I have no recollection.

Q I see where it says on the top you are required to appear before, and what name is typed in there?

A It says Ralph Pernik.

Q Does that indicate that Mr. Goldman spoke with Mr. Pernik before he issued that subpoena?

MR. CUTNER: Objection, your Honor.

Q In the normal course of your practice in 1975 in issuing subpoenas, does that indicate, that notation indication,that Mr. Goldman spoke with Mr. Pernik before issuing the subpoena?

THE COURT: I will permit the question whether under the ordinary practices that would indicate there had been such a discussion.

THE WITNESS: It may have, it may not.

Q It doesn't indicate one way or the other?

THE COURT: Quite clearly it doesn't, in so many words.

Q I show you a collection of pieces of paper and ask if you can identify them.

A The documents appear to indicate that it is a statement of Thomas G. Zammas or Dorothy J. Zammas at the central Bank & Trust Company, Miami, Florida.

Q For what period of time?

A From October 29, 1971 through April 28, 1972.

Q ARe those deposit slips or copies of deposit slips or copies of checks that are at the front of that collection of papers?

A At least two of the documents appear to be a deposit slip and some of the other documents, it appears that checks were returned uncollectible.

Q Are there any transfer slips there?

Excuse me, are the larger pieces of paper transcripts of the account, of Zammas' account?

A The longer pieces of paper appear to be the account statements.

Q What period of time do those encompass?

A It appears to indicate from October 29, 1971 through April 28, 1972.

Q Did you see those pieces of paper at any time in 1975?

A I have no recollection of ever seeing these documents.

Q Did Mr.Goldman tell you about those pieces of paper in 1975?

A I have no recollection Mr.Goldman told me about these pieces of paper.

Q To your knowledge, was Mr. Tucker working with Mr.Goldman in connection with this aspect of the case?

A I have no present recollection of that.

Q No present recollection?

A None.

Q In the hierarchy of things, was Mr. Tucker communicating directly with Mr.Goldman about most aspects of this case or would he communicate to Goldman through you?

A Mr. Tucker was Mr. Goldman's branch chief at the time the investigation started and more likely than not, Mr. Tucker would communicate directly to Mr. Goldman.

Q I show you a letter --

A When I say Mr. Tucker, Mr.Tucker was the branch chief. Mr. Goldman was not in the branch, but in a sense, the way the Commission structure worked, you have attorneys in the branch. Mr. Goldman was an investigator that was assigned to the branch and he would work with the branch chief. Theoretically Mr.Tucker was not above Mr. Goldman and Mr. Goldman was not above Mr. Tucker. In the hierarchy, they were both at the same level, but in practice, the investigator worked at the direction of the attorney and with the attorney.

Q Mr. Goldman was your leg man, wasn't he?

A He was the leg man for the branch on this particular investigation, yes.

Q Mr.Goldman was your leg man, wasn't he?

A Yes.

Q I show you a letter to the U. S. Securities and Exchange Commission from the assistant vice-president of the Central Bank & Trust Company, Miami, Florida, and ask whether that letter indicates to you whether those materials, the Zammas bank records, were received?

MR. CUTNER: Your Honor, I hate to keep butting in here, but we are continuing with an examination of Mr. Perlmutter with respect to documents as to which he has testified he has no recollection of ever seeing and all we are getting is Mr. Perlmutter's testimony of what the document appears to be to him, and I submit, since the documents are in evidence, whatever they show, -- and I think we are prlonging this examination --

THE COURT: Look at it this way, Mr. Cutner. It is shorthand assistance for me. If the defendants wish to mount an argument based upon the contents of this file, they will have a record where they can say to me on page X of the record, you will see that such and such a thing happened. It will save me the effort of looking through the file myself to discover this.

MR. CUTNER: I am sorry, I won't butt in any more.

THE COURT: Out of human compassion, if you can do that for me.

THE WITNESS: May I have the question read back?

(Question read.)

A The document has a stamp which I recognize to be the stamp of the New York regional office of the Securities and Exchange Commission, and it indicates it was received on June 16, 1975.

Q Mr. Perlmutter, are you aware that the indictment in this case specifically sets forth an allegation that Alan Sandberg purchased particular amounts of stock on the open market on particular days?

A I am aware there is an allegation pertaining to a so-called manipulation in November of 1971.

Q Are you aware that the indictment alleges that Alan Sandberg purchased particular amounts of stock on the open market on particular dates?

A I have not read the indictment, so I am trying to answer as best I can.

Q As you sit there now, are you aware that the indictment alleges that Mr.Sandberg purchased particular amounts of stock on the open market on particular days? Are you aware of it or aren't you aware of it?

A As to Mr. Sandberg, no, I am not aware that the indictment alleges it was through Mr. Sandberg.

(continued on next page.)

End 2 PM

A

Q Are you aware that Mr. Goldman --

MR. FRANKEL: Your Honor, just so that my reference is clear to your Honor, I was referring to page 8, paragraph d.

THE COURT: I have it before me.

Q Mr. Perlmutter, I show you two pieces of paper (handing); would you tell us what that represents?

A (After examining) One document appears to be an account statement of Alan E. Sandberg or Beverly P. Sandberg at the Chase Manhattan Bank.

Q For what period?

A (After examining) That looks like from November 15 through December 9.

Q Of what year?

A (After examining) The document doesn't appear to indicate as to which year.

(Mr. Frankel examines.)

Q And the second piece of paper?

A (After examining) The second piece of paper appears to be a bank statement for Alan E. Sandberg or Beverly P. Sandberg, October 15 to November 12. And this document appears to be -- it is referring to November 12, '71.

Q Do you know when those two documents were received?

A No, sir.

Q I show you a letter dated July 16, 1975 to the SEC from Eleanor K. Hoffman, Legal Department, Chase Manhattan Bank, with enclosures (handing). Would you tell us what those enclosures are?

A (After examining) According to the letter it says "Enclosed please find a photocopy of the deposit ticket for $25,000, dated 11/10/71."

Q And does that appear to be what those documents are?

A (After examining) The document appears to be a deposit dated 11/10/71.

Q That letter also states how early that request was made for those documents, doesn't it --

A The letter --

Q -- in that portion that you did not read?

A The next paragraph in the letter says "In accordance with our agreement we understand that you are accepting such copy in full satisfaction of the subpoena dated March 17, 1975."

Q Does that refresh your recollection as to how early it was that the SEC began investigating this alleged manipulation?

A No, sir.

Q I show you a letter dated April 18, 1975 to the SEC from the Compliance Diector of Bruns, Nordeman & Company (handing), and I ask you what information does that purport to convey?

A (After examining) It indicates the names of brokers who sold 11,300 shares of TDA stock which Alan E. Sandberg purchased on November 9, 1971.

Q I show you two more pieces of paper and I ask you to identify those for us (handing).

A (After examining) It appears to be account statements of Alan E. Sandberg at Bruns, Nordeman.

Q For what period, Mr. Perlmutter?

A Taking both pieces of paper that you have given me as a whole, it appears to be November 1 to November 18.

Q 1971?

A (After examining) It appears that it is 1971.

Q I show you a collection of twelve pieces of paper, and I ask you to identify those for us (handing).

A (After examining) It appears to be invoices of Alan E. Sandberg through Ross, Lyons and Co., Inc.

Q For what period?

A (After examining) The documents all appear to be time stamped November 9, '71.

Q Are any of them in November?

A I said November 9.

Q I show you two pieces of paper stapled together with pencil writing on them (handing).

Would you identify those for us, please.

A (After examining) It appears to be a chart entitled "Alan Sandberg," and underneath that it then has "Transactions in TDA stock at Bruns, Nordeman."

Q Whose handwriting is that, would you recognize it?

A I believe that is Mr. Goldman's handwriting.

Q Did you ever see that before?

A I have no recollection of having seen that before.

Q Does it also cover the period of November 1971?

A Yes, sir.

Q I show you a letter dated May 19, 1975 to Jeffrey Tucker from Rosenkrantz, Ehrenkrantz, Lyon & Ross, Inc., and ask you if you can identify that (handing)?

A Yes, sir. It appears to be a letter from that brokerage firm to Mr. Jeffrey Tucker, dated May 19, 1975.

Q I show you a piece -- what appears to be a ledger card headed "Account No. 42-0817630, R. G. Dickinson Co.," with an address, and ask if you can identify that (handing).

A (After examining) It appears to be what you said, sir.

Q What is it?

A It appears to be an account card entitled "R. G. Dickinson Co."

Q With respect to whose account?

(The witness examines.)

Q Here is a second piece of paper -- it may be part of it (handing).

A (After examining) Well, the first piece of paper does not indicate whose account except it has an account number on the back of it. It has an account number on the front of it, and it is two different account numbers.

Q Does it reflect trades in TDA in November 1971?

A It appears to indicate trades or transactions in TDA, November 1971.

Q And the next -- the second one that I handed you?

A (After examining) That one has an account number, and underneath it it has a name, "Thomas G. Zammas," and it has trade dates in November 1971, and one, there is a notation of December 6, 1971, but that doesn't appear to be a transaction. It says, "C. K. Paid."

Q I show you a single piece of paper and ask if you can identify that (handing).

A (After examining) It appears to be an account statement with Bruns, Nordeman for Alan Sandberg.

Q Does it reflect transactions in TDA?

A Yes, sir.

Q Does that reflect transactions in Mastercraft Medical Corp.?

A Yes, sir.

Q For what period?

A Mastercraft Medical?

Q Yes.

A (After examining) There are three transactions -- it looks like November 18th -- the Xeroxing is not the best here.

Another transaction appears to be November 30th, but that doesn't appear to be a transaction, November 30th -- that appears to be a total balance.

Q I show you two pieces of paper and ask if you can identify them (handing).

A (After examining) No, sir, these two pieces of paper, it is difficult to identify.

Q Does the name Thomas Zammas appear on one of them?

A Yes, sir.

Q Does there appear to be information of some type with respect to Thomas Zammas?

A Yes, sir.

Q Is this a copy of a subpoena issued by the SEC, signed by Mr. Goldman to Rosenkrantz, Ehrenkrantz, Lyon & Ross, Inc. (handing)?

A (After examining) Yes, sir, it appears to be Mr. Goldman's signature.

Q And who is the subject of that subpoena directed to see?

A To appear before me.

Q Excuse me?

A To appear before me.

THE COURT: What is the date of the subpoena, please?

THE WITNESS: May 6, 1975.

Q Did anyone appear pursuant to that subpoena?

A I have no knowledge on that, sir.

Q Did you speak to anyone in response to that subpoena?

A No, sir.

Q Did you speak with Mr. Goldman about that subpoena before its issuance?

A I have no recollection of speaking to Mr. Goldman about this subpoena.

Q Did you speak to Mr. Goldman about that company, about the subject, of the subpoena before its issuance?

A I have no recollection of that, sir.

Q I show you a piece of lined white paper on which there is handwriting in pencil (handing).

Can you identify that?

A (After examining) It appears to be Mr. Goldman's handwriting, sir.

Q What does it say? What information does it give?

A It says "TDA Industries."

And underneath that it has "Schreiber Bosse."

Underneath that it has "Thomas Zammas."

Underneath that it has "Bot 17,500 on 11/5/71."

Q Do you know what "B-g-t" represents?

A What?

Q Do you know what "B-g-t" represents?

A "B-g-t"?

Q What are the initials that you just read?

A "B-o-t."

Q Does that mean"bought"?

A I think it would be an abbreviation for "bought."

Q I show you a collection of five pieces of paper stapled together, on which there appears handwriting (handing).

Can you identify that?

A (After examining) It appears to be data of TDA Industries.

Q Do you know -- whose handwriting is it?

A I am not sure of that, sir.

Q Is it yours?

A No, sir.

Q Did you ever see those pieces of paper before today?

A No, sir.

Q Does it reflect certain transactions of TDA, or does it reflect certain transactions in TDA securities as of specific dates?

A Yes, sir.

Q And what are those dates?

A (After examining) Well, the first one has "11/5/7."

The next one has "11/8/71."

The third piece of paper has "11/9/71."

Q Do you know when those pieces of paper were prepared?

A No, sir.

Q I show you one piece of paper, of unlined paper with handwriting on it (handing).

Can you identify the handwriting?

A (After examining) No, sir. I am not sure whose handwriting this is.

Q Do you recognize Mr. Goldman's handwriting?

A I believe I do but this one I don't know -- if that one is his handwriting.

Q Does it look like his handwriting?

A It could very well be.

Q How about the previous collection of pieces of paper that you have in front of you -- does that look like Mr. Goldman's handwriting?

A I am not sure on that one (indicating).

Q Can you identify whether any of the writing on there is Mr. Goldman's or whether it appears to you to be Mr. Goldman's or whether any of it appears to be anyone's other than Mr. Goldman's?

A (After examining) It appears to me that -- it looks to me -- I could be incorrect on this -- it looks like two different handwritings on these documents.

Q Who else was conducting this aspect of the investigation for the SEC besides Mr. Goldman?

A Mr. Goldman may have had another investigator under him to make a chart. That is possible.

Q Do you know?

A I don't know as a fact.

Q Mr. Goldman was working under you, wasn't he?

A At a period of time, yes.

Q What period of time?

A When I became branch chief, and that was in June -- May, June of '75, I believe -- it was June of '75.

Q Did Mr. Goldman conduct an investigation or any part of his investigation as late as June 1975, if you know?

A I don't know, sir.

Q What date did you become branch chief?

A I don't recollect the exact date that I became branch chief.

Q When you interviewed witnesses --

MR. FRANKEL: Strike that.

Excuse me, your Honor.

(Mr. Frankel examines.)

Q You testified yesterday that you were staff attorney in approximately May or June of 1975 when you were promoted to branch chief.

Is that your best recollection?

A Yes, sir.

Q Subsequent to your promotion was Mr. Goldman -- prior to your promotion did you know that Mr. Goldman was investigating this aspect, or whether anyone at the SEC was investigating this aspect of TDA Industries?

A As I indicated before, I believe it was my recollection that Mr. Goldman had a feeling about -- about a possible manipulation in the fall of '71.

(Continued on next page.)

Q Mr. Perlmutter, my question is, before you got promoted to branch chief, were you aware that anyone was investigating any of the manipulation aspect of this case?

A Again, I just can't put it in a time frame.

Q Even to the extent of saying whether before you were promoted, you were aware that there was some investigation, some inquiry being made into the manipulation aspect of this investigation? You are unable to pinpoint it even within that spectrum?

A I am unable to pinpoint. The only thing I recall is Mr.Goldman telling me about his feeling.

Q When was that?

A I just can't recall.

THE COURT: And specifically, you can't say whether it was before or after your own promotion, is that right?

THE WITNESS: Yes, sir. I can't put it in a time frame.

Q I show you a letter dated May 8, 1975, to Mr. Goldman at the SEC from general counsel to Shearson, Haydon Stone, Inc., and ask whether that letter purports to and does enclose a list of all trades in TDA on November 5, November 8 and November 9,1971?

A Yes, sir, the letter so purports.

Q I show you two stapled collections of pieces of paper and ask whether these are copies of additional blue sheets sent out by the SEC in this case?

A It appears to be copies of blue sheets.

Q Does it contain information by the subject of the blue sheets?

A Yes, sir.

Q Who are the subjects of the blue sheets?

A It appears to contain trading information concerning TDA Industries and the broker-dealer supplying the information. And the other document, the name of the broker-dealer that appears is R.G. Dickerson & Company.

Q Does it reflect any trades in TDA in November of 1971?

A Yes, sir.

Q I show you another, what appears to be the blue sheets. Is that a request made to a brokerage firm named Associated Investors for information concerning TDA?

A It appears to be that, yes.

Q What periods are specifically requested?

A 11/5/71 to 11/9/71.

Q I show you what appears to be another copy of a blue sheet to G.A. Saxton & Company. Does this also request information with respect to certain dates?

A Yes, sir.

Q What dates are those?

A 11/4/71 to 11/9/71.

Q I show you another piece of paper that appears to be a blue sheet and what is that?

A Again, this is a blue sheet and it indicates three trade dates -- well, three transactions, two trade dates, 11/8/71 and 11/9/71.

Q On the first four series of blue sheets that you now have in front of you, is there something written in hand on the top of it?

A On the one in my left hand, there is nothing.

Q Mr. Perlmutter, did you see me point to the ones I was interested in when I was just standing here next to you? Did you see me point to the ones I was interested in?

THE COURT: I will sustain the objection. The question is argumentative. If you are trying to get at a precise fact, Mr.Frankel, put the question.

Q What is written in hand on the top of the blue sheet to Doyle, O'Connor & Company?

A On this one which is a copy, what appears to be a copy of a blue sheet, it says "Please expedite".

Q Is that on the front page?

A Yes.

Q What is written on the second page?

A "Please expedite".

Q And the third page?

A "Please expedite".

Q On the blue sheet to Associated Investors, what is written in hand on the top?

A "Please rush".

Q On the blue sheet to G.A. Saxton & Company, what is written on the top of the first page?

A "Please expedite".

Q And the second?

A The same.

Q The third.

A The same.

Q On the top of the blue sheet to Associated Investors, what is written on the top?

A "Please rush".

Q Can you identify the handwriting that wrote "Please rush" or "Please expedite" on those?

A I believe it is Mr. Goldman's.

Q I show you a letter dated April 18 from the operations manager of Doyle, O'Connor to the SEC. Does this letter purport to enclose certain information requested by the party to whom the letter is sent?

A Yes, sir. It appears to be a letter on the stationery of Doyle, O'Connor & Co., Inc., addressed to the Securities and Exchange Commission, attention Mr. Meyer Goldman, dated April 18, 1975.

Q I show you two pieces of paper that are stapled together. Perhaps it is a copy of the front and the back of one ledger sheet. Can you identify that?

A The document is entitled "Security receipt and delivery blotter".

Q Is there a line that is underlined in red?

A Yes, sir.

Q Would you read across that line?

A "TDA Inds., Inc."

Q Did you finish reading all across to the end of the page on that line?

A "0935 see attached slash" -- I can't make out the letters, then"slash Thomas Zammas". Then there is something in parenthesis, I can't make that out. Then there is a number -- 00-[illegible]64-52-1704-1.

Q I show you an office memorandum of the SEC, dated May 28, 1975, and ask whether this indicates that a request was made by the New York regional office to the Cleveland branch office requesting information in connection with Mr.Zammas?

A Yes, sir. It appers to be a memo from an attorney in the Cleveland office to Jeffrey Tucker, attention Meyer Goldman, in the New York office, dated May 28, 1975.

Q I show you a piece of paper with penciled handwriting on it, and ask you if you can identify the handwriting?

A I believe that is Meyer Goldman's handwriting.

Q What does that purport to be?

A It purpots to be -- it looks like a bid and asked price chart of TDA from October 25, 1971, and the last date appears to be November 12, probably '71. It doesn't indicate '71, and also it has as to transactions under the volume starting with November 1, 1971, it has figures which purport to be the volume of the transactions in TDA.

Q I show you a single piece of yellow accounting paper with handwriting on it, and ask you if you can identify the handwriting?

A It appears to be Mr. Goldman's handwriting.

Q What does the piece of paper purport to be?

A A chart concerning TDA Industries, Inc., from 11/5/71 through 11/9/71.

Q What type of information does that purport to contain?

A It lists in the left-hand column, it has B/D, which I would assume stands for broker-dealer.

The next column has -- is entitled "Customer".

The next column has "Shares" and underneath it is "BOT" then sold, and the next column has "shares", "BOT", then "shares" also.

Q I show you two pieces of paper on the top of which are printed "buy-sell". Can you identify these pieces of paper for us?

A It says "buy-sell" and it is entitled Georges Construction Company, then C/O. I can't read the first word. Then it looks like a middle initial "J" and the last word looks like "Georges", G-e-o-r-g-e-s, it looks like.

Q Do you know whether George Georges is a principal in that company?

A I have no idea.

MR. FRANKEL: Your Honor, if the Government knows, I might be able to save calling a witness.

THE COURT: To determine whether or not Mr. Georges is a principal of that company?

MR. FRANKEL: Yes.

THE COURT: Do you care to stipulate as to that fact, Mr.Cutner?

MR. CUTNER: No, your Honor, I frankly don't know.

THE COURT: There is no stipulation. Whether or not it is material I will rule upon if a witness is offered to give such testimony.

Q I show you two pieces of paper and ask you to identify them.

A The first piece of paper is a letter on the letterhead of Foster & Adams.

Q That is the party that sent the letter to you, according to the documents?

A Excuse me?

Q Foster & Adams is the party -- a representative of which signed the letter addressed to you?

Is that Foster & Adams?

A Yes, sir.

Q What are the two pieces of paper representing that you hold in your hands?

A I am sorry, I don't exactly know what these two pieces of paper represent.

MR. FRANKEL: May I read the second one to your Honor?

THE COURT: Very well.

MR. FRANKEL: It is dated April 26, 1972 to Pohs, Levy & Company, 67 Broad Street, New York, New York, attention Mr. Arnold Pohs. "Gentlemen, the sales of the above securities, this is re 3500 shares Leaspec Corporation, the sales of the above securities in the account of Georges Construction Company were canceled and reinstated in the account of Alfonso Simon, Jr., where they should have been originally sold. This was done for income tax purposes since Mr. Simon is also a partner of George Construction Company.

"Very truly yours, George Georges."

Q When did you first hear the name Alfonso Simon, or Alfonso Simon, Jr.?

A I knew there was a Mr. Simon that I heard of. I don't know if there is a Simon, Jr., or Sr. There is a Simon who I believe was a former officer of TDA.

Q When did you first, if you recall, hear the name Simon or Alfonso Simon in connection with the investigation in this case?

A I don't recall when.

Q I show you a piece of yellow paper in handwriting and ask if you can identify the handwriting?

A It appears to be Mr.Goldman's handwriting.

Q What does it purport to reflect?

A It appears to purport to represent transactions in TDA by Alfonso Simon, Jr.

Q For what period of time?

A 11/16/71 -- the last date on it is 11/26/71.

Q I show you a single piece of paper and ask if you can identify that.

A It is entitled "Security receipt and delivery blotter".

Q Is there a reference there to a purchase or sale of TDA?

A There is a reference to TDA as to whether it indicates a purchase or sale. I don't know if the document indicates that.

Q I show you a copy of what purports to be a letter dated November 1, 1971, signed by Peter S. Davis to Continental Stock Transfer Company.

When did you first see that letter or an original or copy of it?

A Sir, I don't recall ever having seen this letter.

Q I show you what purports to be an unsigned copy of a letter to Peter Davis from Donald Gress, dated November 8, 1971, with enclosures.

When did you first see this, or the original of it or another copy?

A I do not recall receiving this, or seeing this.

Q Mr. Perlmutter, you testified yesterday -- you gave the following answers to questions. At page 1512:

"Q To your knowledge, did Mr. Goldman send out these blue sheets?

"A I believe he did.

"Q Is there any doubt about it?

"A I believe he did."

Di you not know yesterday that Mr. Goldman had sent out the blue sheets?

A Yes, I did not know that the blue sheets were sent out, correct.

Q Did Mr. Goldman tell you or did anyone else tellyou that they had interviewed witnesses in connection with the manipulation aspect of the investigation?

A I don't recall Mr. Goldman telling me he had interviewed witnesses.

Q Did you hear, during the course of the investigation, that anyone had interviewed any witnesses?

A In connection with this?

Q With that manipulation aspect?

A No, I do not recall Mr.Goldman telling me he had interviewed anybody else that had interviewed anybody.

Q Did you know while you were testifying yesterday that subpoenas had been issued in connection with the manipulation aspect of the investigation?

A I did not know. I believed that Mr. Goldman would have done it. That is what I indicated yesterday.

Q You didn't know that subpoenas had been issued?

A Pertaining to this particular matter?

Q Pertaining to the manipulation aspect of this case.

Did you know yesterday when you testified that subpoenas had been issued by the SEC in connection with the manipulation aspect of this case, yes or no?

A Again, I have no present recollection.

Q Of whether you knew yesterday?

A I believed that Mr. Goldman sent it out, but I physically never saw the subpoenas.

(continued on next page.)

nd 4 PM

Q Had he told you that he had sent out subpoenas?

A I just have no present recollection of it.

Q But you believed that he had sent out subpoenas.

A Yes, sir.

THE COURT: Based upon your knowledge of his --

THE WITNESS: Of his procedures.

THE COURT: -- of his procedures?

THE WITNESS: Yes, your Honor.

THE COURT: I now purport to declare a five-minute recess.

(Short recess taken.)

MR. FRANKEL: Your Honor, perhaps we can take this up. I have gone through what was given to us by Mr. Cutner. Among the documents was an interoffice memo to Mr. Tucker from someone in the Cleveland branch office, including documents "being transmitted pursuant to your" -- that is Mr. Tucker's -- "memorandum of April 21 and Mr. Goldman's subsequent telephone conversation with Mr. Mercer in this office."

I understand that that memo referred to in this memo is not in the file, marked Exhibit AC, and we request that it be produced.

I just want your Honor to know that. It may be that we can just put it into evidence as part of Exhibit AC when it is produced, but I want the record and your Honor to know at this point that there is at least that memorandum which appears not to be in Exhibit AC.

THE COURT: And you have made known that request to Mr. Cutner?

MR. FRANKEL: Yes.

THE COURT: All right. If it can be discovered I will admit it as part of Exhibit AC.

MR. FRANKEL: Thank you.

BY MR. FRANKEL:

Q Mr. Perlmutter, on the SEC's stamp, the receipt stamp that you referred to, there are names with boxes, and the boxes next to them have check marks sometimes put in those boxes, is that correct, sir?

A Yes, sir.

Q What does the check mark refer to -- when is the check mark put in?

A I know a check mark is put in, Mr. Frankel -- I am not able to really tellyou what the procedure is of who decides to put in the check mark.

Q Well, in your six years with the SEC, you have seen that stamp probably thousands of times, haven't you?

A Yes, sir.

Q Is it the normal course to put a check mark in the box when someone whose name appears next to the box is being specifically sent that document?

A Sometimes the check mark is there and sometimes it may not be there.

Q But if it is there, does that indicate that that memo or a copy of the memo has been sent to the person whose name appears next to the box?

A I just don't know if that would be the policy in each case. I am really unable to testify as to that.

Q You really don't know whether that is the general practice, Mr. Perlmutter?

A I don't know who the person is who put the check marks in and --

Q Put in the check marks -- I am not talking about any particular check mark; I am just talking about the general practice at the SEC, in the thousands of instances where you have seen that SEC stamp with names in boxes -- is it the general practice that if a particular piece of paper or a copy of a piece of paper is sent to a particular person, the box next to that person's name is checked?

A Again, I just -- I never focused in as to when it was checked. Like, for instance, I am looking at one of the exhibits, and there is a box -- it has Moran, Malawsky, Jacobs -- three boxes. In this particular document none of the three boxes are checked. As to whether it is the practice to check a box, not to check a box, when to check a box, I just don't know.

THE COURT: Well, let me ask you this, sir: In your experience at the SEC, would you ever check the box opposite your name in order to indicate, not that it had been sent to you but that you had received it?

THE WITNESS: At times when I did receive it -- in other words, I had looked at it, either I would check it off myself or I would direct someone else who had seen it, since I had also seen it, to check off my name for me.

Q Well, on this particular one you have in front of you --

MR. FRANKEL: Which is a letter dated May 8, 1975, your Honor --

A Right.

Q -- I see there are six boxes. Next to three of them are the names: Moran, Malowsky and Jacobs, and next to the other three are no names.

(The witness examines.)

Q Now what is the purpose of the lines with no names?

A It is a routine procedure. In this particular case it was directed to M. Goldman.

Q "M. Goldman" is handwritten in next to a blank box?

A Yes, sir.

Q Does that indicate that this letter, or a copy of this letter, went to M. Goldman?

A It indicates that this letter should have gone to M. Goldman.

Q Does it indicate to you that in the normal course of the SEC's routine mechanism that letter went to or was aimed at M. Goldman?

A It indicates that it was aimed at M. Goldman.

THE COURT: Mr. Goldman was the target of that letter, right?

THE WITNESS: Yes, sir.

Q Mr. Perlmutter, I show you the letter dated June 10, 1975, to the U. S. Securities & Exchange Commission, Attention Mr. Stuart Perlmutter, signed by Foster & Adams, that you had no recollection of receiving.

Is a name handwritten in next to one of the boxes (handing)?

A (After examining) Yes, sir.

Q And would you read that name?

A The name is Perlmutter.

MR. FRANKEL: No further questions, your Honor.

THE COURT: All right. Mr. Naftalis?

MR. NAFTALIS: Nothing, your Honor.

THE COURT: Mr. Ostrow?

MR. OSTROW: No questions.

THE COURT: Miss Sweeney?

MISS SWEENEY: Nothing.

THE COURT: Mr. Cutner?

MR. CUTNER: Yes, your Honor, just a couple of questions.

REDIRECT EXAMINATION

xxx BY MR. CUTNER:

Q Mr. Perlmutter, I have placed before you all of the papers which comprise Defendant's Exhibit AC.

What I would like you to do, Mr. Perlmutter, is to give us your opinion as to whether or not an SEC civil action charging manipulation of the price of TDA Industries' stock could be brought on the basis of those documents?

A Absolutely not.

MR. FRANKEL: I object to that.

THE COURT: I will take the answer.

A Absolutely not.

MR. CUTNER: I have nothing else, your Honor.

A Yes.

Q So I am talking about a criminal reference.

Is it your testimony that you have no authority -- first we will talk about the formal authority -- for a branch chief, or you as an assistant, as you are, Assistant Regional Administrator, or even Regional Administrator, or Associate, to sit down with me, when I come in with a case and say "Look, I want you to know, you don't know about this case. I am giving it to you. I want to work out something. I think the public will be benefitted. These are not bad guys. You can make a tremendous settlement out of this matter. I just don't want to have any criminal reference."

Any formal authority that you know of that says you cannot do it or the Assistant Regional Administrator or the Associate Regional Administrator cannot do that?

A No, there is nothing to preclude us from discussing that.

Q None whatever. There certainly wasn't any in 1975 when you were there.

A Right.

Q Are you saying, though, as a practical matter you don't do it? Just as a practical matter.

A I don't do it. I don't raise it. I don't do it.

Q All right, you don't, but do you know anybody else who does?

A No, I don't know anybody else who does.

Q It could happen but you don't know?

A It could happen -- sure, anything could happen.

THE COURT: You say you don't raise it, Mr. Nortman, but what if counsel in Mr. Bender's position raises it? What if he says in that initial conference more or less what Mr. Bender has just said, what if defense counsel makes it apparent in connection with his disclosure of the matter or calling it to the SEC's attention, that one of his objectives is to avoid a criminal reference from the SEC or the Department of Justice?

THE WITNESS: Well, in that context, your Honor, a number of points would be raised by myself.

THE COURT: Yes, go ahead.

THE WITNESS: The first point I would raise is, one, even if we were amenable -- let us say the staff was amenable to coming up with a final recommendation, which would not include a criminal reference, I would make it quite clear that is only a recommendation of the staff.

THE COURT: Right.

THE WITNESS: The staff in the New York

Regional Office, or in my case the staff in the Miami office, and that even if we did recommend that in that direction, that recommendation is subject to review and being overruled by the Division of Enforcement acting alone or perhaps in conjunction with the Office of the General Counsel, and if there was no resolution on the staff level it would ultimately be subject to review by the Commission.

That is the first thing I would say.

THE COURT: Yes, unless you had reason, I suppose, to believe the lawyer you were talking to knew that already.

THE WITNESS: That is correct.

The second thing I would sayis, "Now, if you understand that we can't bind any of my colleagues in Washington," and depending if the meeting in my office -- and I cannot bind Don Malawsky, who is Associate Regional Administrator, or Bill Moran, who is the Regional Administrator, and understanding that we cannot bind anybody -- "If you are prepared to accept what I would personally be prepared to recommend, and the quid pro quo would be cooperation and/or a good disposition of a civil case, that is another matter" -- again with the caveat over and over again that it is only my personal recommendation, that it is not binding on anybody.

Q Very good, I understand.

So that in a situation, for example, where I knew you well -- I don't mean on a social basis but on a professional basis, and I did a lot of this work and I came in and gave you the case, such as the case I mentioned to you, and I said -- I have forgotten your first name --

A Bill.

Q -- "Bill, I have this case. What I would like to do is avoid a criminal reference; do everything we can to cooperate with you and to give you, to work out a good civil settlement," you could very well under those circumstances, depending upon what the investigation would develop, say "Okay, Lou, if it works out we will try to accommodate you, but I want you to know it is subject to approval in Washington or somewhere else."

A Right, and with the other caveat, if I might, Mr. Bender, that on the other hand, depending on the results of the investigation --

Q Yes?

A -- we may feel that the facts are such and the state of the proof is such that I would not even give that type of a commitment, that I personally would not recommend a criminal action in the matter.

Q But there are situations where you could very well, as you have indicated, enter into such an understanding?

A That is what I am getting paid for, to exercise my judgment and discretion.

Q All right. Now let me take you back to January 14 -- I know it is quite some time ago, and I have looked at your notes, which are Exhibit AD for identification, but I want to ask you, do you recall whether Milton Gould, during the course of that -- let me withdraw that.

Do you recall on January 14th, or did you know before January 14th of Mr. Gould's friendship or acquaintanceship with Mr. Moran?

A Yes, sir.

Q Was that one of long standing?

A I believe it was.

Q There has been testimony here -- I don't know whether you recall it or not -- that there was a lot of bantering between Mr. Gould and Mr. Moran when they started off?

A Yes.

Q And you said that also occurred on April 11th, is that right?

A Yes.

Q Between you and Mr. Gould?

appreciate it.

(Witness excused.)

MR. CUTNER: My next witness is William D. Moran.

WILLIAM D. MORAN, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CUTNER:

Q Mr. Moran, how are you employed?

A I am employed by the Securities and Exchange Commission.

Q What is your position at the Securities and Exchange Commission?

A I am the regional administrator of the Securities and Exchange Commission here in New York City.

Q How long have you been regional administrator?

A Four years and two months.

Q How long have you been with the Securities and Exchange Commission, Mr.Moran?

A Thirty-seven years and three months.

Q Could you describe for us briefly your career with the Commission, what positions you have held and in what offices?

A In May 1938, I started with the Commission in the general counsel's office.

In 1941 or '42, I went to the Division of Trading and Markets.

1947,I came to the New York regional offices as chief enforcement attorney, and I have been with the SEC from 1947 to '62 when I left and went to the American Stock Exchange for two years.

In May of 1965 I came back to the Securities and Exchange Commission as special counsel and in the ensuing year, I have been either special counsel, associate regional administrator and regional administrator.

Q Mr. Moran, do you know Milton Gould?

A I certainly do, yes, sir.

Q How long have you known Mr. Gould?

A At least 30 years.

Q What is the nature of your relationship with Mr. Gould?

A Mr. Gould has been a practitioner before the SEC on many occasions in those 30 years. I have known him as an opponent, and I have known him as a friend.

Q Do you see him socially as well as professionally?

A Occasionally, yes, sir.

Q Do you know Herbert Kantor?

A No, sir.

Q Was there any discussion of cooperation that might be available from Mr.Gould's clients?

A I don't remember, sir.

Q Was there any discussion as to any other agency, Governmental agency looking into the matter described by Mr.Gould?

A No, sir, there was not.

Q Mr. Moran, can you tell us whether or not you or someone else on the staff of the Commission indicated to Mr. Gould that an action of some sort would be taken?

MR. BENDER: I think he already answered that question, your Honor.

THE COURT: I will permit the answer.

A I think on the basis of the discussion with Mr.Gould, as I indicated earlier, he said that his clients would be amenable to consenting to an injunction and restoring the moneys that were obtained in the fashion I previously outlined. That is my best recollection of the subject that you just mentioned.

Q Can you tell us whether or not you directed the staff to take any action regarding this information?

A Yes.

Q What direction did you give?

A To make a complete and full investigation.

Q Can you tell us whether or not there was any discussion regarding what would happen following the staff's investigation, and I am referring still to the January 14th meeting?

MR. BENDER: That is the third time this question has been asked as to whether there was anything said about what the Commission action would be, and this witness has answered it and I object to the repetition and the leading and the suggestions.

MR. CUTNER: Your Honor, if I may, I would like to be heard and I think it would be better if it were outside the presence of the witness.

THE COURT: Mr. Moran, if you will excuse us for a moment, please.

(Witness leaves the room.)

THE COURT: Let me hear the last question.

(Question read.)

THE COURT: It does seem to me that the witness' recollection of this conversation is rather limited.

MR. BENDER: What I meant, your Honor, if I may be heard.

Mr. Cutner asked him two times before this one, do you recall what action you indicated the Commission

Q Without using the express words, "I want to avoid a criminal reference", to your knowledge did Milton Gould have situations where he disposed of these cases on a civil basis without any criminal reference?

A I can't recall any, sir, specifically. He may have had some with our headquarters office in Washington.

Q I am talking about to your knowledge.

A I don't have any independent recollection today.

Q You wouldn't say it didn't happen?

A I am certain if there was a full search of the files, there were matters that Milton Gould appeared in, and represented people where they were disposed of fully.

Q Without any criminal reference?

A Without any criminal reference.

THE COURT: I gather, Mr. Moran, without particular reference to Mr.Gould's cases, there are civil cases which come into your office in which there is subsequently a criminal reference, then there are civil cases in which there is no criminal reference, right?

THE WITNESS: That is correct, sir, as well as administrative cases that come into the office.

THE COURT: Yes.

Q In your dealings with Mr.Gould over the years, have you found him to be a fairly honest individual?

A A very honorable man, sir.

Q He has never misled you?

A Not to my knowledge, sir.

Q He has always been above board?

A Yes, sir.

Q You have never found him to be a liar?

A No, sir.

Q There has been evidence here that the meeting which took place that you had with Mr. Gould that you testified to occurred on January 1 , so if I use January 14, that is because there has been testimony to that effect.

A I am willing to accept that day, sir.

Q At least in the month that you had in January the meeting, was there any discussion in that meeting that you can recall about a possible disciplinary action that might be taken as to one of Mr. Gould's clients who was a lawyer, and I will mention his name, his name is Davis. If you can recall?

A very vaguely, sir, but I am not sure.

Q The reason why I ask you that, did Milton Gould in reference to that kind of a situation with this DAvis, say something to the effect that he wanted to keep him out of jail?

A No, sir, I have no recollection of that being

AFFIDAVIT OF MAILING

State of New York)
County of New York)

David A. Cutner being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York

That on the 21st day of September, 1977 he served a copy of the within appendix and two copies of the within brief on each of counsel listed below by placing the same in properly postpaid franked envelopes addressed:

Louis Bender, Esq.
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225 Broadway
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John J. Tigue, Esq.
Kostelanetz & Ritholz
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and spoke with Gary P. Naftalis, Esq. of Orans, Elsen, & Polstein, One Rockefeller Plaza, New York, NY, who asked deponent not to mail his copies of said brief and appendix and advised deponent that he would have a messenger pick up his copies of said brief and appendix at deponent's office on September 22, 1977.

And deponent further says that he sealed the said envelopes and placed the same in the mailchute drop for mailing within the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

DAVID A. CUTNER

Sworn to before me this

21st day of September, 1977.

Olga C. Grampp

OLGA C. GRAMPP
Notary Public New York State
No. 43-4820338
Qualified in Richmond Cty.
Comm. Expires March 30, 19 79